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ABSTRACT

The Law section of the Proceedings contains the following 10 papers: "Protection without a Shield: Revisiting the Journalist's Common Law Privilege" (Laurence B. Alexander); "Burning the Global Village: The Constitutionality of State Laws Regulating Indecency in Cyberspace" (Dolores L. Flamiano); "Of Jellyfish and Community Leaders: Redefining the Public Figure in Libel Litigation" (John R. Bender); "The Constitutionality of the FDA's Tobacco Restrictions as a First Amendment Issue" (Yung Kyun Choi); "Point and Click for the 'Right to Know': An Analysis of the Electronic Freedom of Information Act of 1996" (Martin Halstuk); "Blurred Vision: How Supreme Court FOIA Opinions on Invasion of Privacy Have Missed the Target of Legislative Intent" (Martin Halstuk); "In Self-Defense: How the Government Uses National Security Reasons to Withhold Information under the FOIA" (Martin Halstuk); "The Concept That Would Not Die: Scarcity As a Justification for Broadcast Regulation" (Anthony L. Fargo); "Sizing Up Trade Dress: New Era of Cases Tests the Limits of the Lanham Act" (Elizabeth M. Witherspoon); and "Obstacles to Defamation Recovery in Cyberspace User Forums" (Mark Cenite). Individual papers contain references. (CR)

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Protection Without A Shield:
Revisiting the Journalist's Common Law Privilege

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Abstract

Protection Without A Shield: Revisiting the Journalist's Common Law Privilege

This research paper surveys all appellate court common-law claims for journalists' sources and information. It found mostly favorable outcomes for the press when the claims involved testimony to identify a confidential source and testimony about confidential information. Other categories, such as claims involving testimony about non-confidential information and eyewitnessed events, were unfavorable to journalists more often than not. This conclusion is consistent with the *Branzburg v. Hayes* decision, which does not allow for protection for journalists who are witnesses or observers to criminally relevant events and whose testimony may be necessary for good faith prosecutions. Similarly, rulings on documents--including notes, tapes, film, photographs and memoranda--favored the press only 13 percent of the time. Catchall requests, those that ask for "any and all" information related to a specific case, found no favor in the courts. The press prevailed on those claims.

Protection Without A Shield:
Revisiting the Journalist's Common Law Privilege

Historically, journalists in the United States have used confidential sources to aid their news gathering efforts. For some stories, it's a matter of convenience--reporters promise to keep their sources' identities secret in exchange for information that would otherwise take lots of time and resources to uncover. For others, use of confidential sources is the only means available for obtaining certain information. This is most visibly true in the case of the whistle-blower, who typically is a government or corporate insider with access to the information being sought. Whatever the case, these news sources need protection vicariously through the reporters if the flow of information from sources to the consuming public is to remain free.

While journalists traditionally have taken great pride in their close proximity to news events and information, this closeness also has occasionally landed them in court to give their testimony, documents, notes, film, tape and other information.[1] As a result, news professionals have been subpoenaed thousands of times by attorneys in virtually all types of cases.[2] Twenty-nine state legislatures have enacted shield laws, statutes giving journalists a privilege to protect journalists from having to respond to every subpoena. Many other states have some protections for journalists' sources in the case law. The state of California includes a privilege for reporters in its constitution.[3]

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[1] Refusing to comply with a judge's order to testify or produce materials could earn journalists citations for contempt of court and land them in jail. In Florida, a state with a common law privilege to protect journalists, two newspaper reporters have spent some time in jail during the last few years. In 1996, David Kidwell, a reporter for the *Miami Herald*, served two weeks of a 70-day sentence for refusing to testify in the trial of a man accused of murdering a 7-year-old girl. Kidwell interviewed the man in jail but refused to share details of his conversation with prosecutors. "Reporter Freed," *Editor & Publisher*, Nov. 30, 1996, p. 15. In the other case, Tim Roche, a former reporter for the *Stuart News*, was jailed for 18 days of a 30-day sentence in 1993 for his refusal to identify a confidential news source he had used to obtain a sealed order terminating parental rights. "Florida Reporter Completes Sentence," *Editor & Publisher*, April 4, 1993, p. 109.

This paper begins with a review of *Branzburg v. Hayes*, the principal case involving the journalist's constitutional privilege. Next, it surveys the case law in states without protective shield laws, reports on the general findings across the states and analyzes specific cases that illustrate trends. Finally, the paper attempts to add some perspective to how the case law findings fit into the press privilege picture.

Background

Branzburg v. Hayes[4] is the seminal 1972 case in which the U.S. Supreme Court addressed the journalist's testimonial privilege. *Branzburg v. Hayes*[5] was a consolidation of four cases involving three reporters who challenged prosecutors' subpoenas that sought confidential information and sources.[6] On appeal to the U. S. Supreme Court, attorneys for the reporters argued for a qualified privilege to keep their confidences. Specifically, they argued that if reporters are forced to identify confidential sources, then the sources they identify and other confidential sources "will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment."[7]

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[2] Reporters Committee for Freedom of the Press, Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 1989 (1990); Reporters Committee for Freedom of the Press, Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 1991 (1992).

[3] CAL. CONST., Art. I, Sect. 2 (1997).

[4] 408 U.S. 665 (1972).

[5] 408 U.S. 665 (1972).

Justice Byron White, writing for the majority, refused to grant reporters a testimonial privilege exempting them from the obligation to respond to grand jury subpoenas.[8] While he acknowledged the flow of news from sources could be diminished if reporters are compelled to testify, he complained about the lack of clear data illustrating the deterrent effect on sources. "Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative," he wrote.[9] Not only did White leave open the door for state legislatures to enact their own privilege statutes, he noted that Congress and the state courts were free to set standards that would recognize a privilege for journalists. He addressed journalists' concerns that grand jury investigations might be conducted in bad faith or for harassment purposes by suggesting that such inquiries would be subject to judicial control. Moreover, subpoenas issued pursuant to such investigations could be challenged on motions to quash.[10]

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[6] Two of the cases resulted from stories written by Paul Branzburg, a reporter for the *Louisville Courier-Journal*. In one of those cases, Branzburg was asked to identify two young people he observed synthesizing hashish from marijuana. In Branzburg's other case, he was subpoenaed to testify about the use and sale of drugs after he reported interviewing several dozen drug users. Paul Pappas, a reporter for a Massachusetts television station, was called before a grand jury to tell what he had seen and heard when he spent several hours at a Black Panthers headquarters. The fourth case involved Earl Caldwell, a reporter for the *New York Times*, who was called before a grand jury investigating the activities of the Black Panthers in Oakland California.

[7] *Id.* at 680.

[8] *Id.*

[9] *Id.* at 694.

In a brief concurring opinion, Justice Lewis Powell reaffirmed the majority's view that journalists could challenge a subpoena issued for confidential information that is not essential to the grand jury investigation. He suggested these challenges be judged on a case-by-case basis, balancing press freedom against the general obligation of all citizens to testify.[11]

Justice William O. Douglas, an absolutist on First Amendment issues, wrote a dissenting opinion that took the view that journalists have an absolute right not to appear before grand juries, and journalists who voluntarily appear before such bodies may invoke the First Amendment privilege to specific questions. Two guiding principles he used to support the First Amendment privilege include the need for privacy in communications between reporters and sources and the contribution of the free flow of information on the process of self-governance.[12] Douglas then outlined the horrible consequences that he believed would visit the journalist who was not protected from subpoenas. "If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public will be ended... the reporter's main function in society will be to pass on to the public the press release which the various departments of government issue."[13]

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[10] *Id.*

[11] *Id.* at 709-710 (Powell, J., concurring).

[12] *Id.* at 711-725 (Douglas, J., dissenting).

Justice Potter Stewart also wrote a dissenting opinion in which he took issue with the majority's demand for precise figures on confidential news relationships and the effect of subpoenas on news flow. He noted the difficulty in counting those relationships and stated that the court had never before combined the need for empirical data with the enforcement of First Amendment rights.[14] Stewart favored a qualified privilege for journalists faced with subpoenas. In fact, he argued for adoption of his own test. Before a journalist can be compelled to testify in a criminal proceeding, he argued, the prosecution must: (1) show probable cause to believe the journalist has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[15]

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[13] *Id.* at 722.

[14] *Id.* at 725-752. (Stewart, J., dissenting).

[15] *Id.* at 743.

Since *Branzburg*, the Supreme Court has revisited press privilege on two other occasions.[16] *Branzburg* left open the possibility for state courts to construe "their own constitutions so as to recognize a newsman's privilege, either qualified or absolute."[17]

Killenberg conducted a study five years after the *Branzburg* decision and found that more state and lower federal courts were likely to recognize a journalist's claim of privilege using Powell's balancing test, Stewart's three-part justification, or some combination of the two.[18]

The *Branzburg* court's refusal to recognize a privilege for journalists also spurred action on the part of many state legislators. Many of the lawmakers were concerned about the increases in news-related subpoenas, the confusion in interpreting the holding in *Branzburg* and the need to protect the public interest in the free flow of information as a matter of public policy.[19]

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[16] See Zurcher v. Stanford Daily, 436 U.S. 547 (1978) and Herbert v. Lando, 441 U.S. 153 (1979).

In the *Zurcher* case, the Supreme Court refused to provide any protection to journalists for search warrants and seizures of their work product. Despite the fact that the journalists were third parties and were not suspected of any criminal activity, the court upheld the search of the offices of the *Stanford Daily* newspaper, where investigators thought newspaper photographers had taken photographs that would aid in identifying persons who had assaulted police officers during a violent campus demonstration.

Likewise, in *Herbert*, the court refused to create a privilege prohibiting inquiry into the journalist's editorial process. In that case, the plaintiff, a former army colonel, sought to discover the conclusions reached by CBS reporters during and after their investigations by having access to their informal conversations with one another and with their sources and by examining their states of mind and intentions. Such state-of-mind evidence was necessary to prove that the defendant knew what it published about him was false in satisfying the actual malice test.

[17] *Id.* at 706.

[18] George M. Killenberg, *Branzburg Revisited: The Struggle to Define Newsman's Privilege Goes On*, 55 JOURNALISM Q. 456 (1978).

[19] Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815 (1983).

Increases in news-related subpoenas have been tracked in a number of academic studies which also have recognized the importance of confidential news sources to the process of news gathering and reporting.[20] Studies also have documented that journalists rely heavily on these persons who will give valuable information only on the condition that their names be omitted from publication or that the information not be used.[21] Courts have used the subpoena power to compel the testimony of journalists who have relevant information that will shed light on a particular case. Although some of the available studies on journalists' use of unnamed sources was presented to the court in *Branzburg*, the majority felt there was insufficient empirical data to conclude that journalists needed a privilege to protect their sources.[22] Years after *Branzburg*, the Reporters Committee for Freedom of the Press, seeking to fill the void in research data, conducted a five-year, three-part study which demonstrated an overall increase in the percentage of news organizations subpoenaed between 1989 and 1993.[23] The committee hoped the three reports would help persuade judges and legislators that the subpoena problem was serious enough "to irreparably undermine the independence of the press."[24]

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[20] James A. Guest and Alan L. Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw U.L. Rev. 18 (1969); John E. Osborn, *The Reporter's Confidential Privilege: "Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Colum. Human Rights L. Rev. 57 (1985).

[21] Byron St. Dizier, *Reporters' Use of Confidential Sources, 1974 and 1984: A Comparative Study*, Newspaper Res J. 44 (1985); Laurence B. Alexander, Linda M. Perry & Bill F. Chamberlin, *Branzburg v. Hayes Revisited: A Survey of Journalists Who Become Subpoena Targets*, 15 Newspaper Res. J. 83 (1994).

[22] The court cited studies by Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L. Rev. 229 (1971) and Guest and Stanzler *supra* note 20.

[23] Reporters Committee for Freedom of the Press. (1990, 1992) , *supra* note 2 , Reporters Committee for Freedom of the Press, Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 1993 (1995).

Disagreement by the justices in *Branzburg* led to some confusion in the lower courts over the meaning of the decision. Some courts strictly interpreted the plurality in *Branzburg* to refuse to give a media defendant any First Amendment confidentiality privilege. Most courts, however, recognized a qualified privilege for journalists by giving greater weight to Justice Powell's case-by-case approach, balancing press freedom against a compelling public interest in the information.[25] Other lower courts adopted balancing tests similar to Justice Stewart's three-part analysis in his dissenting opinion.[26] This confusion over the meaning of *Branzburg,* combined with a lack of uniformity in applying reporter's privileges, moved some state legislatures to action.

Legal commentators have acknowledged the critical need for protection in this area, and they have suggested either a national shield law or U.S. Supreme Court intervention to provide the needed protection.[27] Otherwise, they say, journalists must rely on ad hoc and sometimes inconsistent decisions from state common law privileges or state court interpretations of shield laws.

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[24] REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (1995), *supra* note 23.

[25] Killenberg, supra note 15; Marcus, *supra* note 16; Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1 (1986); *Privileged Communication*, 98 HARV. L. REV. 1592 (1985).

[26] Note, *Just Between You and Me... For Now: Reexamining A Qualified Privilege for Reporters To Keep Sources Confidential in Grand Jury Proceedings*, 1988 U. ILL. L. REV. 739 (1988).

[27] Marcus, *supra* note 19; Osborn, *supra* note 20.

A journalist's privilege also is important for maintaining and cultivating the checking value embedded in the First Amendment. Professor Vincent Blasi, originator of the checking theory of free expression, would grant an unqualified privilege protecting the identity of all confidential sources who work for the government. He also would extend blanket protection to confidential information these sources convey to reporters and a minimally qualified privilege covering all other reporter-source relationships.[28]

The purpose of this research project is look back over a quarter century since *Branzburg* to determine how the lower state appellate courts have interpreted the case in determining the degree of protection for journalists who are subject to court subpoenas in states that have not enacted shield laws. Secondly, this article will analyze the findings to determine what they mean for source protection and news gathering efforts.

Methodology

This research project uses a combination of quantitative and qualitative methods to capture the scope of common-law protection for journalists. After quantifying the claims of the journalist's privilege in the appellate courts, the paper uses qualitative methods to go beyond the numbers and analyze specific legal cases that point to legal trends.

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[28] Vincent Blasi, "The Checking Value in First Amendment Theory," AMERICAN BAR FOUNDATION RES. J. 523 (1977).

The research began with identification of all states without shield laws. That phase was accomplished by first locating all 29 states with shield laws. This left no question concerning the identity of the 21 nonshield states. Next, a computerized database search was conducted for all of the post-1972 reported court cases involving press privilege in the states without protective shield laws. That year was chosen as a benchmark because of the U.S. Supreme Court's decision at that time refusing to give journalists a privilege that would excuse them from court appearances sought by a subpoena.

In general, the study did not include trial court rulings because of the unavailability of a reliable means for including all of them. State trial court judges seldom write analytical opinions on the disposition of subpoenas, and the results of court rulings at that level often go unreported. In contrast, appellate courts have the forums for resolving journalists' claims of privilege. These courts typically issue opinions explaining their decisions. Their opinions are given significance too because they carry greater precedential value as "controlling authority." As such, they are the final arbiters of the rights and protections of journalists in common-law privilege states.

After the cases were read and analyzed, they were categorized as follows: Testimony to identify a confidential source; testimony of information that is confidential; testimony about non-confidential information and eyewitnessed events; documents such as notes, tapes, film, photographs, letters and memoranda; and multi-item requests, including "catch-all" subpoenas that ask simultaneously for all materials on a particular issue.

Specific cases that were representative of numerical findings were discussed and analyzed as appropriate.

Findings and Discussion

Of the 21 nonshield states analyzed in this study, only 15 of them[29] have appellate court cases reported interpreting the bounds of the journalist's privilege. No relevant case law was found in Hawaii, Mississippi, North Carolina, South Dakota, Utah and Wyoming.

This study analyzed a total of 44 cases and found strong support in the case law for protection of confidential news sources. (See Table 1) In 75 percent of the cases involving confidential sources, the press prevailed on the claim of a First Amendment privilege to keep their sources secret. This is comparable to 72 percent of favorable outcomes measured in a recent study of cases interpreting shield laws in states that have those statutes.[30] This strong support was evident in both civil and criminal cases.

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[29] The 15 jurisdictions included Connecticut, Florida, Idaho, Iowa, Kansas, Maine, Massachusetts, Missouri, New Hampshire, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin.

[30] Alexander, Laurence B. and Bush, Ellen M., "Judicial Review of the Journalist's Privilege in States with Shield Laws," a paper presented to the International Communication Association, Albuquerque, New Mexico, May 26, 1995.

Criminal Cases

In *State ex rel. Green Bay Newspaper Co. v. Circuit Court*,[31] for example, the Supreme Court of Wisconsin upheld the qualified privilege for two reporters who published stories in connection with a pending murder case. A judge subpoenaed the reporters to appear at a pretrial hearing and divulge the sources of their articles. They refused to do so, even in an in-camera hearing. Relying on a pre-*Branzburg* protective precedent in that state and the Wisconsin constitution, the court held that once it is satisfied that "journalists" are asserting the privilege and that confidentiality is involved, then it must balance that privilege against the defendant's right to obtain witnesses on his behalf. Next there must be proof that the testimony will be "competent, relevant, material and exculpatory or will lead to such evidence." Finally, the defendant must make a showing that he has sought the information through investigating other sources.[32] The defendant failed to satisfy all three prongs of the test.

Another strong confidential-source precedent was decided by the Virginia Supreme Court in *Brown v. Commonwealth*.[33] In that case, the *Free Lance Star* quoted a source who allegedly witnessed a murder. Charles Willie Brown, who was convicted of second-degree murder, challenged the trial court's recognition of the reporter's privilege. When the reporter failed to reveal her source, the court balanced press freedom with the defendant's rights to compel disclosure and concluded that she would not be required to divulge her source. The court noted that the confidentiality privilege should yield only when the defendant's need is essential to a fair trial. The defense had problems showing the materiality of the prior inconsistent statements of the confidential source. Therefore, the court concluded, that since the inconsistent statements were collateral and not material, the identity of the source was irrelevant.[34]

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[31] 335 N.W. 2d 367 (Wis. 1983).

[32] *Id.*

[33] 204 S.W. 2d 429 (Va. 1974).

Materiality also was at issue in the Vermont Supreme Court case of *State v. St. Pete.*[35] In that case, an attorney for several defendants arrested in a drug raid subpoenaed a television reporter to appear at a deposition in which one of the defendants sought the source of his foreknowledge of the raid. When asked about it at a deposition, the reporter refused to answer, claiming a privilege under the First Amendment. The court held that privileges claimed in these situations could be overcome if the interrogator demonstrates the identity is relevant, there are no alternative sources and the name is material on the issue of guilt or innocence. If such a showing cannot be made, the deponent cannot really be compelled to answer the question.[36]

It should be noted that the strong privilege support found in these cases favor a qualified privilege instead of an absolute one. These cases set forth circumstances under which the privilege can be overcome. In each case, the conditions bear a strong resemblance to those in Justice Stewart's dissent in *Branzburg*.

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[34] *Id.*

[35] 315 A.2d 254 (Vt. 1974).

[36] *Id.*

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Civil Cases

The figures also point to a significant amount of protection for confidential sources in civil cases. In *Lamberto v. Brown*,[37] a newspaper reporter for the *Des Moines Register*, wrote an article summarizing the claims in a lawsuit filed by lawyer Donald Gartin against Dan McAllister, a bank president, alleging invasion of privacy, slander and assorted "unlawful, criminal, intentional and malicious acts." McAllister sought to depose the reporter, Roman Lamberto, about conversations with Gartin. He wanted to use the information to confirm Gartin's statements about the conversations. Lamberto refused to testify, citing the qualified reporter's privilege in *Winegard v. Oxberger*.[38] *Winegard* said a compelling state interest could overcome a First Amendment privilege if the information is necessary or critical to the course of action; if other reasonable means of obtaining the information have been exhausted; and if it does not appear from the record that the action or defense is frivolous. The court found the "frivolous" requirement unnecessary and eliminated it. The court also found that the testimony sought was not necessary or critical. Testimony to be used only for testing one's credibility, the court held, can hardly be said to go the heart of the case. Therefore, the court applied the privilege in favor of Lamberto.

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[37] 309 N.W. 2d 471 (Iowa 1982).

[38] 258 N.W. 2d 847 (Iowa 1977).

In *Sinnott v. Boston Retirement Board,*[39] Charles A. Radin wrote an article for Globe Newspaper company about the pension disability application of the fired chief of the Boston licensing division. The article quoted from Sinnott's application to the pension board, which was apparently given to the reporter by "City Hall Sources." The newspaper reported that Sinnott attributed his disability "to the emotional impact of his attendance, in his capacity as 'city censor,' at two 1979 rock concerts and at a 'frenzied' licensing hearing during which a participating attorney died."[40] Five weeks after the article appeared, Sinnott sued the board members and city officials for libel, and he subpoenaed Radin to attend a deposition and produce documents that would identify the confidential sources in the article. Radin refused to testify and challenged the subpoena. The Massachusetts Supreme Judicial Court ruled that the lower court's judge did not abuse his discretion in refusing to compel Sinnott's testimony. The lower court judge was warranted in balancing Sinnott's need for the information against possible damage to the free flow of information. According to the court, that assessment is not incorrect as a matter of law, especially in light of the questionable viability of Sinnott's invasion of privacy claims and a lack of a demonstration of a need to know Radin's sources. The appeals court also implied that other alternate sources had not been exhausted.

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[39] 524 N.E. 2d 100 (Mass. 1988).

[40] *Id.* at 101.

Another civil case involving the press as a nonparty and a fired employee led to a decision favorable to the press.

In *Opinion of the Justices,*[41] the Supreme Court of New Hampshire had been called upon for an advisory opinion on whether the Senate President and Council may order a news reporter to disclose the sources of information he used in preparing a series of articles on the performance of John A. King, the director of probation. The Department of Probation sought King's removal after R. Warren Pease, a reporter for the *New Hampshire Sunday News*, wrote a series of articles about the probation department that contained employee criticism of King. The court limited its holding to the case before it, ruling that in this civil proceeding involving the press as a nonparty, the balance is struck in favor of the press. The court would not at the same time try to "decide the scope of the privilege, whether it is absolute, who is a reporter, what qualifies as 'press,' what the situation would be if criminal proceedings were at issue, or whether libel actions would require disclosure."[42]

In Connecticut *State Board of Labor Relations v. Fagin,*[43] a newspaper reporter, Stephen E. Fagin, had used confidential sources in writing an article on the president of the police union, which stated that the board was expected to recommend dismissal of the officer. The discharged officer alleged an unfair labor practice against the town of Stonington. At the hearing on the charge, union counsel asked Fagin whether the town's Board of Police Commissioners was the source of his information. He refused to answer. The Superior Court of Connecticut relied on prior second circuit federal court cases which recognized a limited constitutional privilege of newspersons to withhold confidential sources. Those cases require that two conditions be met prior before the privilege becomes effective: (1) that a reasonable effort just be made by the inquirer to obtain the information sought in some other manner, and (2) that the inquiry be designed to elicit information highly relevant to the proceedings. Here, the court found that no effort had been made to identify the source of the defendant's newspaper article except by asking him to make the disclosure. Neither was it clear to the court that the second inquiry, requiring a high degree of relevancy, had been met. Thus, the petition to the court for an order requiring the defendant to answer the confidential source questions was dismissed.

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[41] 373 A. 2d 644 (N.H. 1977).

[42] *Id.* at 646.

[43] 370 A.2d 1095 (Conn. Superior Court.1976).

Journalist As Party in Libel Actions

The study also found instances in some jurisdictions in which reporters who were parties to libel actions were allowed to maintain confidential sources in spite of *Herbert v. Lando,*[44] a U. S. Supreme Court precedent that opened the door to greater discovery possibilities for plaintiffs in libel actions against the press. Courts in Washington, Texas and Idaho carefully considered the needs of a free press and the requirements of the First Amendment in making their rulings.

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[44] 441 U.S. 153 (1979).

In *Senear v. The Daily Journal-American,*[45] the plaintiff, a business agent of the local Amalgamated Transit Workers Union, was accused in a newspaper article by undisclosed union members of making a "deal" unfavorable to union members with management and of personally encouraging "sickouts." During discovery, Senear served the newspaper with interrogatories which directed the newspaper to disclose the names of union members who furnished certain information from the story. The *Journal-American* refused, claiming that such answers would disclose confidential sources. In concluding that a qualified privilege exists in favor of the newspaper at this stage, the court remanded the case. Before giving disclosure of a newsperson's sources, Senear must show to the court's satisfaction that there is independent merit to the libel claim; the First Amendment interests of the news media are outweighed by those of the litigant; the plaintiff had tried successfully to get the information elsewhere; and that the information sought is relevant, material, and of critical importance to the presentation of his case.

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[45] 618 P.2d 536 (Wash. 1980).

In *Dallas Morning News Co. v. Garcia,*[46] two libel suits were filed against the newspaper for a series of articles it published titled, "Texas' Little Columbia," investigating illegal drug trafficking in two counties bordering Mexico along the Rio Grande River. The articles attempted to show how drug money had corrupted government officials in the two counties. Plaintiffs, a county commissioner and a sheriff, filed a series of interrogatories and requests for production in which they sought the names of all third-party sources that were interviewed for the series. The defendants said they answered all interrogatories except those that would lead to their disclosure confidential sources. The court found the media defendants had met their burden of proof in establishing the existence of a privilege, but the plaintiffs had not produced substantial evidence sufficient to overcome the privilege. According to the court, one plaintiff failed to offer substantial proof of the falsity of the allegations; neither of the plaintiffs showed they had exhausted all alternative means of learning the identities; and neither showed a material or critical need for identities of collateral sources. In upholding the privilege for the press, the court emphasized that "disclosure of confidential sources will be compelled only as a last resort after pursuit of all other opportunities have failed."[47]

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[46] 822 S.W. 2d 675 (Tex. Ct. App. 1991).

[47] *Id.* at 685.

In *Sierra Life Insurance Co, v. Magic Valley Newspapers Inc,*[48] the newspaper published a series of investigative reports over an eight-month period on the insurance company after the state had canceled Sierra's license to sell insurance. Sierra sued the newspaper for libel and other related torts. The newspaper refused to respond to interrogatories for confidential sources and information. The newspaper contended that the statements made to it by its confidential sources were not used, either directly or indirectly, in the stories it published, and contended that the sources had merely suggested to the newspaper the existence of documents or public officials which might provide useful information. The lower court sanctioned it by striking several of its pleadings. The appeals court found this remedy in error, and it reversed and remanded the case with instructions to reinstate the pleadings. The court also noted its concern for the protection of confidential sources.

> We recognize that the news media rely upon confidential sources in the preparation of many stories, particularly those involving government or large organizations. The ability to keep the identity of those sources confidential is not infrequently a prerequisite to obtaining information.[49]

In this case, however, the newspaper never claimed confidential sources as a reason for non-disclosure. It appears that such sources served only to make the newspaper aware of where information was available.

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[48] 623 P. 2d 103 (Idaho 1980).

[49] *Id.* at 109.

Journalist's Work Product

Like states with shield laws, the common-law states have been reluctant to recognize a privilege for film, video tapes, outtakes, or events that journalists witness. Only one of the seven cases studied on this point was decided favorably for the press.

In *CBS Inc. v. Campbell,*[50] St. Louis County issued a subpoena on CBS' (KMOX-TV) news department for audio and videotapes of conversation with two men concerning their gambling operations after parts of those tapes were aired by the station in a two-part series on gambling. Reporter Matt Meagher posed as a tavern owner interested in gambling machines and got Red Markwell to agree to supply them. In the second part of the series Meagher asserted that Markwell, a state representative, had an interest with Lloyd Grice in the Goodtime Bingo Co., which constituted a conflict of interest. The station was willing to produce its on-air broadcast tapes for the grand jury, but feared that full compliance with the subpoena would force it to provide unpublished, non-broadcast tapes or "out-takes," interfering with its ability to gather the news, a violation of the qualified privilege. The court noted that precedent for a qualified privilege in grand jury proceedings has allowed it only in connection with a journalist's confidential sources or information. Also, courts recognizing a qualified privilege for unpublished information have not done so in the context of a grand jury proceeding. Thus finding no evidence of bad faith or harassment by the grand jury, the court refused to allow the privilege.

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[50] 645 S.W. 2d 30 (Mo. Ct. App. 1982).

Summary and Conclusions

Based on an analysis of all of the common-law claims identified, this study found that 75 percent of them were favorable when they involved testimony to identify a confidential source. It should come as no surprise that confidential-source protection, which has a long history in this country in the case law and statutes, would decidedly favor journalists. Also, claims involving confidential information favored the press 66 percent of the time, but that was based only on five claims that were brought.

Other categories, as expected, did not turn up such glowing results for news professionals. Claims involving testimony about non-confidential information and eyewitnessed events were favorable to journalists at a 22 percent mark. This conclusion is consistent with the *Branzburg* case, which does not allow for protection for journalists who are witnesses or observers to criminally relevant events and whose testimony may be necessary for good faith prosecutions. Similarly, claims involving documents--notes, tapes, film, photographs and memoranda--were also vulnerable to the subpoena power. Only 13 percent of the claims favored the press. Catchall requests, those that ask for "any and all" information related to a specific case, found no favor in the courts. The press prevailed on those claims.

Interestingly, the common law approach to the journalist's privilege makes no distinction between absolute and qualified privilege. State privilege statutes, however, are considered absolute if there are no qualifications or conditions attached to whether the privilege will be enforced. Qualified privilege statutes often provide factors for courts to apply in balancing the concerns of the journalists against other parties. It is the latter privilege that has been adopted as a legal standard by common-law courts. Courts deciding press privilege issues attempt to balance press freedom against another party's right to compel disclosure. In such cases, a reporter's qualified privilege to maintain confidential sources, information or documents may be overcome by a stronger showing of the sought-after material's relevance, necessity and lack of available alternative outlets to get the same material.

The cases analyzed herein make clear that there is strong precedent for a common law privilege to protect journalists from having to testify about confidential sources and information. That protection is at least equally effective as state statutes are in shielding the news media from being hauled into court to make such disclosures.

The results of this study are consistent with some aspects of Blasi's First Amendment checking theory and at odds with others. The most noteable connection with Blasi's work occurred in the category that examined the level of protection for confidential sources. Blasi's checking theory requires protection for these sources who work for the government and the confidential information they may pass along. The study, however, did not separate the government-source cases for special analysis. Included in the 75 percent of favorable outcomes are news sources of all kinds, including those who were witnesses to crimes. Likewise, the study found that common law jurisdictions were more likely than not to protect testimony about information that is confidential. Three other cases illustrate the checking theory: *Sinnott v. Boston Retirement Board,*[51] *Opinion of the Justices*[52] and *State Board of Labor Relations v. Fagin.*[53] In all of these cases, confidential sources were presumably working for the government when they used their relationship with a journalist to criticize government leaders.

For all other types of reporter/source relationships, Blasi said he would grant a minimally qualified privilege. Again, the researchers found congruency with the results of this study. In the categories of testimony about non-confidential information and eyewitnessed events, favorable claims reached only 22 percent. At the same time only 13 percent of the claims that measured the fate of documents (including notes, tapes, film and photographs) proved favorable.

Perhaps the reason the numbers seem to track the theory so well is because the theory captures the original intent of the reporter's privilege. Courts, for their part, tend to appreciate the importance of the privilege to the newsgathering function.

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[51] 524 N.E. 2d 100 (Mass. 1988).

[52] 373 A. 2d 644 (N.H. 1977).

[53] 370 A. 2d 1095 (Conn. Superior Court 1976).

Finally, the strong desire of the courts to protect confidentiality of sources and information also could be attributed to the nature of the expression they protect. While the privilege is usually written to protect the journalist from divulging confidential sources or information, the free-expression needs of the underlying source must not be overlooked. Sources who seek confidentiality are exercising their speech rights under the First Amendment to speak facelessly through a reporter of their choice. Anytime the confidence is breached, the source's ability to communicate freely by his chosen method is curtailed.

Table 1

Categories of Common-Law Privilege

Category	Favorable Claims	Unfavorable Claims	Totals	Percent Favorable
Testimony to Identify a Confidential Source	15	5	20	75%
Testimony About Information that is Confidential	3	2	5	66%
Testimony About Non-Confidential Information and Eyewitnessed Events	2	7	9	22%
Documents--includes notes, tapes, film, photographs and memoranda	1	7	8	13%
Multi-item (Catchall) Requests	2	0	2	100%
Totals	23	21	44	52%

Burning the Global Village:

The Constitutionality of State Laws Regulating Indecency in Cyberspace

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Burning the Global Village:

The Constitutionality of State Laws Regulating Indecency in Cyberspace

Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig.

--Judge Stewart Dalzell[1]

INTRODUCTION

Enforcement of the Communications Decency Act, a federal law criminalizing the distribution of indecent material to minors in cyberspace,[2] was halted last summer when two panels of federal judges ruled the law unconstitutional.[3] On March 19, 1997 the United States Supreme Court heard oral argument in *Reno v. ACLU*, the government's appeal of one of the injunctions.[4] The first ruling from the Court on free-speech rights in cyberspace is expected in June or July[5]. Although public debate has focused on the national law, for the past two years about twenty state legislatures have enacted or considered legislation that would regulate online speech, including speech defined as "indecent" or "harmful to minors."[6] Such legislative activity has generated considerable controversy in some states, but little national attention has focused on the legislation and there are few published legal analyses of these laws. The proper legal framework for regulating content on the Internet has yet to be determined;[7] the CDA and the states' efforts to regulate online indecency represent the first steps toward defining such a framework.

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[1] American Civil Liberties Union v. Reno, No. Civ. A. 96-963 (E.D. Pa. Jun. 11, 1996) at 44. *Cf.* Butler v. Michigan, 352 U.S. 380, 383 (1957).

[2] Cyberspace is a term coined by science fiction writer William Gibson in his 1984 novel *Neuromancer* to describe the "place" where computer-mediated communication occurs. Cyberspace is commonly used to refer to the Internet, a global network linking together hundreds of thousands of computer networks.

[3] ACLU v. Reno, No. Civ. A. 96-963 (E.D. Pa. Jun. 11, 1996); Shea v. Reno, No. 96 Civ. 0976 (DLC), slip op. SDNY-1 (SDNY July 29, 1996). *See also Government Enjoined From Enforcing Indecency Law*, NEWS MEDIA & THE LAW, Summer 1996, at 19.

[4] For materials related to the Supreme Court appeal (including oral argument transcripts, a chronology of the case, and a background briefing), *see* the ACLU home page <http://www.aclu.org/issues/cyber/trial/appeal.html>. *See also* the Electronic Privacy Information Center home page <http://www.epic.org/CDA/>.

[5] *Supreme Court Seems Skeptical of Decency Act*, MERCURY CENTER/SAN JOSE MERCURY NEWS (published March 20, 1997) <http://www1.sjmercury.com/news/nation/decency/cda/031997.htm>.

The purpose of this paper is to examine the constitutionality of state laws regulating indecency on the Internet, especially in the light of recent rulings finding indecency provisions of the federal Communications Decency Act unconstitutionally vague and overbroad. Although state laws regulate a wide range of speech in cyberspace,[8] this paper focuses on the regulation of non-obscene sexually explicit material. The primary reason for this focus is that the cases involving the CDA provide a legal precedent with which to analyze the state indecency laws.

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[6] Pamela Mendels, *States Jump Into Internet Legislation*, N.Y. Times, July 19, 1996 <http://www.nytimes.com/web/docsroot/library/cyber/week/0719states.html>.

[7] *See generally* Note, *The Message Is the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994) (arguing that the information superhighway poses a challenge to the prevailing hierarchy of protections for the media, whereby electronic media are subjected to greater government regulation).

[8] Five states that passed cyberspace laws in 1995 and 1996 (Florida, Kansas, Maryland, Montana, and Virginia) expanded existing child pornography statutes to include online transmissions. Illinois and North Carolina passed laws prohibiting sexual solicitation of a minor by computer. Oklahoma adopted legislation directing state agencies to remove all obscene material from their computer systems. Connecticut passed a law prohibiting online messages to harass, annoy, or alarm another person. And Georgia criminalized the use of pseudonyms online and prohibited unauthorized links to web sites with trade names or logos. Also, Massachusetts, Oregon, Pennsylvania, and Washington considered similar bills, but declined to pass them. *See* the American Civil Liberties Union web site <http://www.aclu.org/issues/cyber.html>. For links to the legislation, *see* the State Censorship site <http://www.teleport.com/~richieb/state/>.

Also, non-obscene sexually explicit expression on the Internet is where the limits of free expression are being tested.[9] Several of the state statutes regulate speech that is illegal or, like obscene speech, not constitutionally protected, and in the process merely duplicate existing laws. Indecent speech, however, is protected by the First Amendment and therefore any attempt to regulate it raises serious First Amendment concerns.[10]

A review of the state laws regulating cyberspace passed in 1995 and 1996 found three statutes involving non-obscene sexually explicit material. These were passed in New York, Oklahoma, and Virginia.[11] The New York statute, which took effect in November 1996, makes it a felony to transmit "indecent" materials to minors.[12] The Oklahoma statute, enacted in April 1995, prohibits the online transmission of material deemed "harmful to minors."[13] Finally, the Virginia law, enacted in March 1996, makes it illegal for any government employee, except state police, to use state-owned computer systems to access sexually explicit material.[14]

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[9] *See* Fred H. Cate, *Cybersex: Regulating Sexually Explicit Expression on the Internet*, 14 BEHAV. SCI. & L. 145, 147 (1996).

[10] The Supreme Court has ruled that in order to regulate indecent material, the government must meet the strict scrutiny test, which requires it to show that the government has a compelling interest in regulating the material and that the law is narrowly tailored to meet that interest.

[11] A Georgia statute, enacted in March 1995, prohibits the online transmission of, among other things, "obscene or vulgar speech to minors." It is not included in this study because it involves "fighting words," a category of speech that, like obscenity, has no First Amendment protection.

[12] S. 210-E, (N.Y. 1996) <http://assembly.state.ny.us/cgi-bin/showtext?billnum=200210>. *See infra* pp. 16-24.

[13] H.R. 1048, 45th Leg., 1st Sess. (Okla. 1995). *See infra* pp. 17-24.

[14] Va. Code Ann. tit. 2.1 § 804-806 (1996). *See infra* pp. 17-24.

In *ALA v. Pataki*, fifteen plaintiffs[15] filed a motion for a preliminary injunction of the New York law on March 3, 1997 in federal district court, saying they (and all Internet users) could face prison sentences of up to four years under the law.[16] A hearing, scheduled to begin on April 3, will likely include a live demonstration of the Internet and expert testimony, two elements that proved influential in the *ACLU v. Reno* decision.[17] The ACLU is planning to challenge the Virginia statute in court, calling it a "prior restraint on protected speech and an impermissible restriction of First Amendment rights."[18]

BACKGROUND

Because this study seeks to assess the constitutionality of state laws regulating indecency in cyberspace, a brief discussion of the new medium provides the necessary background information and a framework for analysis. The Internet[19] is a massive information network connecting more than 45,000 separate computer networks and 25 to 30 million users in 154 countries and growing at an estimated rate of 191 percent every year.[20] In his 1967 classic, *The*

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[15] ALA v. Pataki plaintiffs are: the American Library Association, the Freedom to Read Foundation, the New York Library Association, the American Booksellers Foundation for Free Expression, Westchester Library System, BiblioBytes, Association of American Publishers, Interactive Digital Software Association, Magazine Publishers of America, Public Access Networks Corp., ECHO, NYC Net, Art on the Net, Peacefire and the American Civil Liberties Union.

[16] *ACLU Moves to Protect Netizens From Prosecution Under New York Cybercensorship Law*, March 3, 1997 <http://www.aclu.org/news/no30397a.html>.

[17] *Id.*

[18] *ACLU Cyber-Liberties Update*, July 1996 <http://www.aclu.org/issues/cyber/upjulya.html>.

[19] For the purposes of this paper, the terms "Internet" and "cyberspace" will be used interchangeably.

[20] Cate, *supra* note 9, at 146.

Medium is the Message, Marshall McLuhan predicted that the electronic media would create a "global village" by allowing people to transcend the limitations of time and space. Thirty years later, the Internet is making the global village a reality.[21] When the Internet was born in 1969 as ARPANET, it was the domain of the military and academia.[22] It remained restricted to defense and research until the late 1980s when the creation of the World Wide Web and web browsers made the Internet accessible to the general public. While the vast majority of content on the Internet is intended for legitimate educational, cultural, political, commercial, and entertainment purposes,[23] the presence of sexually explicit material on the Internet has generated intense public controversy.[24] In fact, a *New York Times* article described the enactment of the CDA as the culmination of a wave of "cyberporn" hysteria that was ignited by media assertions of the wide availability of sexually explicit material on the Internet.[25]

LITERATURE REVIEW

The controversy surrounding the CDA and sexually explicit content on the Internet has inspired a considerable amount of scholarship in the area of government regulation of cyberspace. However, little or no scholarly attention has focused on the specific topic of this study, the constitutionality of state laws regulating indecency in cyberspace. John D. Zelezny's media law textbook has a chapter on cyberspace, which includes a section about adult material on the Net and the CDA.[26] His book provides a useful grounding for discussions of legal issues in cyberspace, while acknowledging the problems inherent to the early stages of "cyberlaw," notably the scarcity of authoritative case law specific to the medium.[27] Consequently, legal analyses of the Internet often require that "analogies must be drawn with older cases concerning other media."[28]

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[21] *See* HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER (1993).

[22] ARPANET was developed by the U.S. Defense Department to support military research and to create a computer network that, in part because of its decentralization, would be able to withstand a nuclear attack. *See* ED KROL, THE WHOLE INTERNET - USER'S GUIDE & CATALOG, 15 (1994).

[23] *See* Cate, *supra* note 9, at 147 (estimating that sexually explicit material makes up one-third of one percent of Internet traffic).

[24] *See* Philip Elmer-Dewitt, *On a Screen Near You: It's Popular, Pervasive and Surprisingly Perverse, According to the First Survey of On-line Erotica. And There's No Easy Way to Stamp It Out,* TIME, July 3, 1995 (summarizing the research findings of the Carnegie Mellon study by Marty Rimm). *See infra* note 42.

[25] *Worldwide, Internet Restrictions Are Growing,* N.Y. TIMES (visited Oct. 25, 1996) <http://www.nytimes.com/web/docsroot/library/cyber/week/0910hrw.html#1>.

There are few articles or books in the field of mass communication that focus on government regulation of indecency in cyberspace, although some authors have noted the difficulties associated with applying existing media policies to the Internet.[29] Others have discussed briefly the implications of cyberspace for rights of free expression in the areas of libel, hate speech, and obscenity.[30] Legal newspapers, computer magazines, and journalism trade publications reported the defeat of the CDA as a coup for freedom of speech in cyberspace, but generally failed to offer in-depth analyses.[31] Law journal articles examined cyberspace regulation in general and analyzed the CDA, but did not consider state legislation. Commentary on the state legislation was found on the web sites of free speech advocacy groups such as the American Civil Liberties Union and the Electronic Frontier Foundation. These sources, although extremely helpful, offered oversimplified analyses of the state laws.

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[26] JOHN D. ZELEZNY, COMMUNICATIONS LAW 480 (2d ed. 1997).

[27] *Id.* at 483.

[28] *Id.*

[29] Peter Ludlow, among others, has noted that the cyberspace revolution not only creates "the greatest experiment in freedom of expression the world has ever seen," but in the process it also creates new legal problems as the laws of older media are applied to cyberspace. *See* PETER LUDLOW, HIGH NOON ON THE ELECTRONIC FRONTIER 251-310 (1996).

[30] Gary Gumpert & Susan J. Drucker, *From Locomotion to Telecommunication, or Paths of Safety, Streets of Gore, in* COMMUNICATION IN CYBERSPACE: SOCIAL INTERACTION IN AN ELECTRONIC ENVIRONMENT 25, 32-35 (Lance Strate et al. eds., 1996).

This review focuses on three broad categories of literature: (1) popular press accounts of state legislation regulating the Internet; (2) analyses of state legislation from advocacy groups such as the American Civil Liberties Union; and (3) law review articles about government regulation of sexually explicit content on the Internet.

Newspaper and magazine articles about state cyberspace laws framed the issue as a replay of the CDA controversy, but on a smaller scale. *New York Times* reporter Pamela Mendels portrayed the New York and Virginia laws and the opposition to them as part of an ongoing struggle to define the role of the government vis-a-vis cyberspace. Mendels said that the supporters of online censorship see the laws as "reasonable measures to shield society, especially children, from sexually graphic material" while the opponents fear the laws will stifle legitimate free expression.[32] Mendels quoted RoAnn M. Destito, the Democratic assemblywoman who introduced the New York bill, as saying that the law is necessary to protect children from online pedophiles. But according to Christopher Dunn, legal director of the New York Civil Liberties Union, the law could also limit adults' access to indecent material. In the Mendels article, the Virginia law prohibiting state employees from accessing sexually explicit material on state computers was criticized by Robert M. O'Neil, director of the Thomas Jefferson Center for the Protection of Free Expression. O'Neil called the law poorly crafted and said that it could chill legitimate research by state university professors in a number of fields, including art history, sociology, and medicine.[33]

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[31] *See* Jonah Sieger, *Communications Decency Act is Defeated: Landmark Victory for Netizens*, COMMUNICATIONS OF THE ACM, Aug. 1996, at 13; Bill Holland, *Internet Content Law Declared Unconstitutional*, BILLBOARD, June 22, 1996, at 4; Christopher Stern, *Court Bars Internet Indecency Rule*, BROADCASTING & CABLE, June 17, 1996, at 20; Kyle E. Niederpruem, *It's Not a Matter of Decency, It's Just Censorship*, THE QUILL, Apr. 1996, at 10; William B. Ketter, *The Decency Act is Indecent: ASNE Fights Internet Censorship*, THE AMERICAN EDITOR, Jan. 1996, at 2; and Mark Sableman, *Responsibility on the Net: Home Grown or Imposed?*, ST. LOUIS JOURNALISM REVIEW, Dec. 1995.

[32] Mendels, *supra* note 6.

While the *New York Times* framed the cyberspace indecency debate as a matter of free speech vs. child protection, some free speech advocacy groups analyzed the state indecency laws as simply unconstitutional, regardless of their intent. Moreover, they argued that parents, not the government, should bear responsibility for protecting their children from sexually explicit material or solicitation. *The Threat of State Censorship Bills*, a document on the ACLU home page, argued that laws designed to keep adult materials from minors unconstitutionally reduce all online content to material suitable only for children. This document also criticized the "harmful to minors" definition used in some state laws because this definition could be interpreted to include important online information, such as sex education materials or abuse recovery discussion groups.[34]

In addition to these general objections to cyberspace regulation, the ACLU published analyses of the New York and Virginia laws. It called both laws unconstitutionally overbroad and predicted that they will chill protected speech on the Internet. The New York law was faulted for not excluding materials with serious value, such as literary works and information about AIDS,[35] a criticism also made of the CDA by Judge Dolores Sloviter.[36] Similarly, the Virginia law was seen as so sweeping that it could prohibit professors at state universities and social workers in child abuse cases from using the Internet to research sexually explicit information.[37]

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[33] *Id.*

[34] ACLU home page, *supra* note 8.

Rich Burroughs, author of the online publication *State Censorship*, characterized the New York law as unconstitutional, prohibiting the online distribution of everything from safe sex information to Botticelli's famous works.[38] He also noted that it poses serious liability threats for system operators.[39] The Electronic Frontier Foundation strongly criticized the New York law, for the same reasons noted above, but also because it burdens the service providers and ignores existing parental control technology.[40] The EFF also condemned the Oklahoma law defining obscene as "harmful to minors," arguing that this law is either completely pointless because obscenity is already illegal, or unconstitutional because it attempts to broaden the definition of obscenity to include constitutionally protected material.[41]

Law journal articles did not specifically discuss the state laws regulating cyberspace.

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[35] *ACLU Cyber-Liberties Update*, Oct. 31, 1996 <http://www.aclu.org/issues/cyber/cluoct31.html #ny>.

[36] ACLU v. Reno, No. Civ. A. 96-963 (E.D. Pa. Jun. 11, 1996).

[37] *ACLU Cyber-Liberties Update*, July 1996 <http://www.aclu.org/issues/cyber/upjulya.html>.

[38] *State Censorship* <http://www.teleport.com/~richieb/state/>.

[39] *Id.*

[40] *EFF Action Alerts* <http://www.eff.org/pub/alerts/foreign_and_local/index.html#alc>.

[41] *Id.*

Instead, they either examined Internet regulation in general or analyzed the CDA.[42] The articles that took the broader view considered the First Amendment implications of the cyberspace medium. Some authors concluded that the Internet is creating a real marketplace of ideas, and that government regulation is more dangerous than the objectionable content that some people want to censor. The articles that analyzed the CDA focused on the indecency standard and its applicability to cyberspace.

Several of the law journal articles reviewed were concerned primarily with whether, in banning "indecent" material, the government has chosen the least restrictive means of preventing harm to children and with the related issue of technological alternatives to government censorship. For example, Cass R. Sunstein devoted a major portion of his 1995 article in *The Yale Law Journal* to a discussion of the importance of establishing that a governmental ban is the least restrictive means of preventing harm.[43] Sunstein hinted that in the case of the Internet, government regulation is not the least restrictive means, but indicated that the alternatives would have to be explored before reaching a conclusion.[44] Sean Adam Shiff, in a 1996 *William Mitchell Law Review* article, asked the same question and concluded that the answer will have to await further technological advances.[45] If the technology reaches a point where users could effectively control the content on their screens and block out all unwanted material, then the government would no longer have a compelling interest in regulating the medium.[46]

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[42] Articles discussing "pornography" in cyberspace are not included in this literature review because, although the term has no strict legal definition, "pornography" in these articles generally refers to obscene rather than indecent speech. *See* Barbara M. Ryga, *Cyberporn: Contemplating the First Amendment in Cyberspace,* 6 SETON HALL CONST. L.J. 221 (1995); Marty Rimm, *Marketing Pornography on the Information Superhighway (Carnegie Mellon Study of Pornography)*, 83 GEO. L.J. 1849 (1995); Catharine A. MacKinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace,* 83 GEO. L.J. 1959 (1989); Carlin Meyer, *Reclaiming Sex From the Pornographers: Cybersexual Possibilities,* 83 GEO. L.J. 1969 (1995).

[43] Cass R. Sunstein, *The First Amendment in Cyberspace,* 104 YALE L. J. 1800-01 (1995).

[44] *Id.*, at 1801.

Some authors took this argument a step further, stating that viable alternatives to government regulation are already in place and concluding that government regulation of cyberspace indecency is not only overly restrictive, but unnecessary. Fred H. Cate wrote in *Behavioral Sciences and the Law* that the Internet is well suited to enhancing parental control over children's viewing.[47] In particular, he cited the use of warning screens through which users must pass before accessing adult material and the use of passwords, which are supplied only after proof of age is furnished.[48] In the *Golden Gate University Law Review*, Andrew Spett cited some additional alternatives which would achieve the government's purpose of protecting children from exposure to offensive material while also preserving First Amendment protections. He mentioned filtering software, which is already available and is being improved, and he suggested a self-imposed rating system.[49] He concluded that the legislature must avoid assuming a parental role and impinging on First Amendment rights.[50] Jason Kay discussed in the *Southern California*

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[45] Sean Adam Shiff, *The Good, the Bad and the Ugly: Criminal Liability for Obscene and Indecent Speech on the Internet*, 22 WM. MITCHELL L. REV. 731, 765 (1996).

[46] *Id.*, at 765-66.

[47] CATE, *supra* note 9, at 145-57.

[48] *Id.*, at 157.

[49] Andrew Spett, *A Pig in the Parlor: An Examination of Legislation Directed at Obscenity and Indecency on the Internet*, 26 GOLDEN GATE U. L. REV. 599, 623-24 (1996).

[50] *Id.*, at 625. *See also* Harvey A. Silverglate, *Cyberspeech at Risk*, THE NAT'L L.J., Mar. 4, 1996, at A19.

Interdisciplinary Law Journal two other forms of self-regulation in cyberspace: flaming and the self-restricted channeling of sexually explicit material.[51] Flaming, an online attack on someone who posts objectionable or inappropriate material, represents a form of cyberspace law and order, according to Kay, while self-restricted channeling refers to the way that newsgroups generally limit discussions of sex to the appropriate groups in the hierarchy.[52]

Two authors focused their discussion of cyberspace regulation on problems associated with the term "indecent." Mike Godwin, staff counsel to the Electronic Frontier Foundation, discussed the indecency question in a panel discussion published in *Cardozo Arts & Entertainment Law Journal*. He pointed out that Congress has considered a large amount of indecency regulation and that indecency "has no meaning at all, because it has never had a qualified statutory or court definition."[53] He concluded that the term is unacceptably broad and would stifle free speech in a remarkable new medium. Similarly, Nadine Strossen, professor of law at New York Law School and president of the ACLU, discussed the indecency question in the same panel discussion and concluded that the term is too vague and subjective. She also argued that a law employing the indecency standard, such as the CDA, would be used disproportionately against marginalized and unpopular groups, such as gays and lesbians.[54]

Two authors considered cyberspace in broader terms, viewing it as a potential means for society to more fully realize the promise of the First Amendment and to expand freedom of speech. In the *Yale Law Journal*, Eugene Volokh argued that cyberspace brings reality closer to the idealized world of the "marketplace of ideas" because in cyberspace speech is relatively cheap and some ideas which might be silenced in the conventional media are given relatively wide exposure.[55] Thus, cyberspace may help to realize the First Amendment promise, whereby all ideas are accessible to all people.[56] In the same journal, Thomas G. Krattenmaker and L. A. Powe, Jr. articulated a closely related position. They argued for discarding the broadcast model of regulation, which offers less protection to the media, and expanding the print model to all media, including the emerging technologies such as cyberspace.[57] They concluded that "the goals of an open, stable democracy are best advanced by relying on recipients to choose from among competing speakers unconstrained by government."[58]

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[51] Jason Kay, *Sexuality, Live Without a Net: Regulating Obscenity and Indecency on the Global Network*, 4 S. CAL. INTERDISC. L. J. 355, 385-86 (1995).

[52] *Id.*

[53] *Regulating the Internet: Should Pornography Get a Free Ride on the Information Superhighway? A Panel Discussion*, 14 CARDOZO ARTS & ENT. L. J. 343, 348 (1996).

[54] *Id.*, at 366-67.

In sum, although the literature relevant to this study discussed state cyberspace regulation and analyzed federal laws against online indecency, the literature did not offer a detailed analysis of state laws regulating online indecency. Rather, the bulk of the literature focused on the First Amendment implications of cyberspace and the alternatives to government regulation. Thus, the literature does not contain a comprehensive study of the constitutionality of state laws regulating indecency in cyberspace. This study attempts to fill that gap by closely examining laws in New

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[55] Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L. J. 1805, 1806 (1995).

[56] *Id.*, at 1845-47.

[57] Thomas G. Krattenmaker & L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L. J. 1719, 1720 (1995). *But cf.* David Post, *New Rules for the Net? The First Amendment May Need a Whole Different Definition in Cyberspace*, AM. LAWYER, Jul.-Aug. 1995, at 112 (discussing the difficulty of applying First Amendment principles to a medium in which national boundaries, physical space, and scarce resources have little meaning).

[58] Krattenmaker, *supra* note 57, at 1733.

York, Oklahoma, and Virginia regulating online material that is deemed indecent or harmful to minors.

RESEARCH QUESTIONS

This paper will address the following questions:

1. What have states done in the area of regulating indecency on the Internet?
2. Are state statutes regulating indecency on the Internet constitutional? In particular, do they pass the strict scrutiny test? Is there a compelling government interest? Is the regulation the least restrictive means of meeting the government interest?
3. What is the current legal framework for regulating content in cyberspace? What are the rationales underlying this framework, and do they apply to cyberspace?

METHODOLOGY

In order to determine the constitutionality of state laws regulating indecency on the Internet, this paper uses both statutory analysis and case analysis. In particular, it analyzes the following sources: state statutes regulating Internet content in New York, Oklahoma, and Virginia; the Communications Decency Act, part of the Telecommunications Act of 1996; *ACLU v. Reno* and *Shea v. Reno*, two cases resulting in preliminary injunctions of the CDA; and relevant court decisions on indecency, including *FCC v. Pacifica* and *Sable Communications v. California*. As Zelezny noted, the body of authoritative cyberspace case law is limited.[59] This paper reflects the scarcity of "cyberlaw," drawing analogies when necessary from older cases concerning other media.

THE CONSTITUTIONALITY OF STATE REGULATIONS

The following analysis of state statutes regulating online indecency has three main areas of focus: (1) the language and scope of statutes regulating indecency on the Internet; (2) the constitutional issues raised by these statutes; and (3) the legal framework for regulating Internet indecency. The first part examines closely the relevant legislation in New York, Oklahoma, and Virginia. It also compares the language of these laws to that of the CDA. The second section analyzes the constitutional implications of the state legislation, again using the CDA as a basis for comparison. The third section explores a broader question underlying cyberspace content regulation: Should existing models of media regulation be applied to cyberspace, or does the new technology require a new framework?

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[59] ZELEZNY, *supra* note 26, at 483.

STATUTES REGULATING INTERNET INDECENCY

Indecency, in the legal sense, refers to a category of speech that is restricted in the broadcast media even though it is not obscene and would be unrestricted in the print media.[60] In attempting to regulate indecency on the Internet, the government has applied the broadcast framework of regulation to the Internet.[61] In the process, it granted this new medium the same lower degree of First Amendment protection that radio and television broadcasts are given.[62] This section describes the provisions of the New York, Oklahoma, and Virginia statutes, paying particular attention to their definitions of prohibited speech and affirmative defenses provided for in the statutes.

Defining the prohibited speech

Before examining the state laws regulating Internet indecency, this paper describes and analyzes the statutory language of the CDA in order to provide a framework for analysis of the state legislation. A part of the Telecommunications Act of 1996, the CDA prohibits the transmission of indecent material to minors over the Internet:

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[60] *Id., at* 443.

[61] *See infra* pp. 26-31.

[62] Full First Amendment protection would mean that the government had no power to regulate indecency in cyberspace, just as it currently cannot regulate indecency in newspapers or other print media.

> Whoever in interstate or foreign communications knowingly uses any interactive computer service to display, in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication, shall be fined (up to $250,000) or imprisoned not more than two years, or both.[63]

Thus the CDA attempted to ban from the Internet expression that is patently offensive but not necessarily obscene, unless that expression can be made unavailable to minors. The CDA's definition of prohibited speech, in extending beyond obscenity, covers constitutionally protected speech. The broadness of this definition, among other considerations, led two panels of judges to rule the CDA unconstitutional.[64]

Similarly, the New York statute makes it a crime to disseminate indecent material to minors over the Internet. This statute prohibits

> communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, [when such communication is initiated or engaged in] with a minor through any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another.[65]

The language of the New York statute, like that of the CDA, encompasses nonobscene sexually explicit material, which is constitutionally protected. It differs from the CDA in its use of the term "harmful to minors" and in its definition of indecent material. The CDA uses the indecency definition set forth by the Federal Communications Commission in 1975, as material that "describes or depicts, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[66] However, the New York statute defines indecency as material that "in whole or in part, depicts actual or simulated sexual conduct or sado-masochistic abuse which is harmful to minors."[67] Because the prohibited material need not be "patently offensive" but merely "harmful to minors," it could encompass a wide range of material with educational, literary, or artistic merit. In drafting the CDA, Congress rejected the "harmful to minors" standard in favor of the more inclusive "indecency" ban.[68] The final version of the New York statute was approved by the legislature in October 1996, several months after the CDA was ruled unconstitutional. Thus, the language of the New York statute may be interpreted as an attempt to make the law acceptable to critics who found the "indecency" standard too broad and vague.

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[63] 47 U.S.C. § 223(d).

[64] *See infra* pp. 21-22.

[65] S. 210-E, (N.Y. 1996) <http://assembly.state.ny.us/cgi-bin/showtext?billnum=200210>.

Oklahoma also uses the "harmful to minors" standard in its legislation: "No person shall cause to be placed in a computer system or an electronic bulletin board any material which is harmful to minors."[69] The statute includes this definition of "harmful to minors":

> "Harmful to minors" means that quality of any description, exhibition, presentation or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when the material or performance, taken as a whole, has the following characteristics:

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[66] *In re* Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C. 2d 94, 98 (1975).

[67] S. 210-E, (N.Y. 1996) <http://assembly.state.ny.us/cgi-bin/showtext?billnum=200210>.

[68] *See CDA or No, States Aim to Censor*, INTERNET WORLD, Oct. 1996, at 20.

[69] H.R. 1048, 45th Leg., 1st Sess. (Okla. 1995).

> a. the average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors, and
> b. the average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement or sadomasochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors, and
> c. the material or performance lacks serious literary, scientific, medical, artistic, or political value for minors.[70]

Not only is the Oklahoma definition of "harmful to minors" significantly narrower than the New York definition; it is also virtually the same as the definition of "obscenity" stated in *Miller v. California*.[71] Thus, the Oklahoma law appears to regulate obscene material, which is not protected by the First Amendment and is already illegal in most states.

The Virginia law prohibits a broad range of material, but is far more limited in its scope than the other laws this paper examines because it only applies to state employees. The statute provides that no state employee "shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content."[72] Exceptions to this restriction are: state police and employees who access such material "in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking."[73] The restricted material is defined as any description or visual representation "depicting sexual bestiality, a lewd exhibition of nudity...sexual excitement, sexual conduct or sadomasochistic abuse...coprophilia, urophilia, or fetishism."[74] This language is similar to that used in the New York legislation, but its limitation to employees of the state of Virginia using state computers suggests that it represents substantially less of a First Amendment threat than an outright ban and therefore may be held to a lesser standard of scrutiny than the CDA.

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[70] *Id.*

[71] Obscene matter is governed by the three-prong standard set forth by the United States Supreme Court in Miller v. California, 413 U.S. 15, 24 (1973): (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

[72] Va. Code Ann. tit. 2.1 § 804-806 (1996).

[73] *Id.*

Affirmative defenses

The New York statute provides a defense for certain categories of users of the "indecent material":

> [I]t is an affirmative defense that the persons to whom the allegedly obscene or indecent material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing, disseminating or viewing the same.[75]

> The New York statute also provides the following defenses:

> (A) The defendant made a reasonable effort to ascertain the true age of the minor and was unable to do so as a result of actions taken by the minor; or
> (B) the defendant has taken, in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to materials specified...including any method which is feasible under available technology; or
> (C) The defendant has restricted access to such materials by requiring use of a verified credit card, debit account, adult access code or adult personal identification number; or
> (D) The defendant has in good faith established a mechanism such that the labelling, segregation or other mechanism enables such material to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening and the defendant has not otherwise solicited minors not subject to such screening or blocking capabilities to access that material or to circumvent any such screening or

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[74] *Id.*

[75] S. 210-E, (N.Y. 1996) <http://assembly.state.ny.us/cgi-bin/showtext?billnum=200210>

blocking.[76]

These defenses are more comprehensive than the ones provided in the CDA, perhaps reflecting the New York legislature's awareness of the constitutional problems inherent in the CDA. These defenses, however, have been criticized because they are not available for the majority of Internet users given the current technology.[77]

The statutory defense in Oklahoma hinges on knowledge of the "character and content" of the material" and of the age of the minor.[78] It provides a defense for defendants who can show they attempted to verify the minor's age. "[A]n honest mistake, shall constitute an excuse from liability pursuant to this act if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor."[79]

The statute defines "reasonable bona fide effort" as

> an attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate or other governmental or educational identification card or paper not relying solely on he [sic] oral allegations or apparent age of the minor.[80]

The only defense allowed under the Virginia statute is for state employees who access sexually explicit material "to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking."[81] The statute further requires that "[s]uch agency approvals shall be given in writing by agency heads."[82]

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[76] *Id.*

[77] *The New York State Online Censorship Law*, ACLU Home Page <http://www.aclu.org/action/nychill.html>.

[78] H.R. 1048, 45th Leg., 1st Sess. (Okla. 1995).

[79] *Id.*

[80] *Id.*

CONSTITUTIONAL ISSUES

The paper now examines the constitutional issues raised by the federal Communications Decency Act and similar statutes in Oklahoma, New York, and Virginia. Because they cover constitutionally protected speech, state laws regulating indecency on the Internet are subject to serious constitutional challenge. In constitutional law, strict scrutiny is the highest level of judicial review for statutes and other government actions. Under strict scrutiny, statutes that impede freedom of speech can be valid only if the action is found to serve a compelling public interest and to be narrowly tailored to meet this interest. Two panels of judges applied the strict scrutiny test to the CDA and found that the law was unconstitutionally vague and overbroad.[83] The state legislation appear to be susceptible to the same criticism.

Compelling government interest

The Supreme Court has said that "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."[84] Also, people should be able to speak freely about issues of their choosing, without fear of reprisal because other people may not agree with or appreciate the content of their messages.[85] Although certain types of speech can constitutionally be banned by the government, indecent speech is protected by the First Amendment. This protection, however, is not absolute. The Supreme Court ruled in the landmark case *FCC v. Pacifica Foundation* that the government may regulate indecent speech transmitted by the broadcast media.[86] But in order for a governmental regulation of indecency to pass constitutional muster, the government must shown that it has a compelling interest in regulating and any regulation must be accomplished in the least restrictive manner.[87]

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[81] Va. Code Ann. tit. 2.1 § 804-806 (1996).

[82] *Id.*

[83] ACLU v. Reno, No. Civ. A. 96-963 (E.D. Pa. Jun. 11, 1996) and Shea v. Reno, No. 96 Civ. 0976 (DLC), slip op. SDNY-1 (SDNY July 29, 1996).

[84] Turner Broadcasting Corporation v. FCC, 512 U.S 622, 22 Media L. Rep. 1865, 1873 (1994).

In deciding to grant a preliminary injunction of the CDA, Judge Dolores Sloviter argued that although the government has a compelling interest "to shield a substantial number of minors from some of the online material that motivated Congress to enact the CDA,"[88] it does not have a compelling interest in regulating some other online material covered or potentially covered by the CDA. In particular, Sloviter cites the following "non-pornographic, albeit sexually explicit, material" that could be banned by the CDA: the text of the Broadway play *Angels in America*, which includes graphic portrayals of homosexuality and AIDS; news articles on female genital mutilation; and photographs of the sculptures in India of couples copulating in numerous positions.[89]

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[85] *Id.*

[86] The United States Supreme Court applied the FCC definition of "indecency" in FCC v. Pacifica Foundation 438 U.S. 726, 3 Media L. Rep. 2553, 2561 (1978): "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience."

[87] Sable Communications of California v. FCC, 492 U.S. 115, 16 Media L. Rep. 1961, 1966 (1989).

[88] ACLU v. Reno, No. Civ. A. 96-963 (E.D. Pa. Jun. 11, 1996).

Similarly, the government of New York has a compelling interest in protecting children from some of the material covered in its statute. However, the inclusion of depictions of "actual or simulated nudity" or "sexual conduct"[90] indicates that the statute could also be interpreted to include a wide range of sexually explicit material with educational, scientific, and literary value. The fact that the New York statute encompasses material that the government does not have a compelling interest in regulating suggests that the statute will fail this part of the strict scrutiny test. The ACLU and the New York Civil Liberties Union filed a motion in March 1997 for a preliminary injunction of the statute on behalf of the American Library Association and 14 other plaintiffs. The groups said the law is an unconstitutional content-based restriction on free speech that would reduce adult communications on the Internet to levels acceptable for a six-year-old.[91]

The Oklahoma statute covers obscene speech, which the Supreme Court has found has no First Amendment protection.[92] Therefore, the issue with this law is not whether the government has a compelling interest to regulate obscene speech; it clearly does. The question is whether this new law that bans obscene speech to minors, but calls such speech "harmful to minors," will be applied to speech outside the Supreme Court's definition of obscenity.

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[89] *Id.*

[90] S. 210-E, (N.Y. 1996) <http://assembly.state.ny.us/cgi-bin/showtext?billnum=200210>.

[91] *ACLU Moves to Protect Netizens From Prosecution Under New York Cybercensorship Law*, *supra* note 16.

[92] Miller v. California, 413 U.S. 15 (1973). *See also, e.g.* 18 U.S.C. § 1461, 1462 (1988) (making it a federal crime to knowingly use the mail to send obscene material, to import it into the United States, or to transport it between states by any method); 47 U.S.C. § 223 (1988) (making it unlawful to make obscene communications by means of the telephone for a commercial purpose).

The Virginia law prohibits state employees from accessing sexually explicit material on state-owned computers. Although the Supreme Court has ruled that the government has a compelling interest in protecting minors from certain types of sexually explicit speech, it has not ruled that the government has an interest in prohibiting adults from accessing such material. Any governmental interest in this area would perhaps be outweighed by the First Amendment presumption that prior restraints are unconstitutional.[93]

Least restrictive means

The Supreme Court ruled in *Sable Communications of California v. FCC* that in order to regulate constitutionally protected speech, the government must not only show a compelling government interest, but it must also accomplish any restrictions in the least restrictive manner.[94] In other words, the law must be narrowly tailored to meet the government's need. If there are viable and effective alternatives to government regulation, the government's efforts to regulate will most likely be found unconstitutional. Accordingly, the Supreme Court ruled in *Sable* that the government could not ban indecent telephone messages (also known as "dial-a-porn") because there were indeed viable and effective alternatives to the government ban.[95]

Similarly, in *ACLU v. Reno*, the CDA was found not to be narrowly tailored.[96] Instead, the court found that the statute was overbroad, intruding on a substantial category of protected speech for adults.[97] The court suggested there are viable alternatives to a ban on Internet indecency, including computer software designed to filter out objectionable material. The court also said the government should accomplish its goal of protecting children from sexually explicit material on the Internet by vigorously enforcing existing obscenity and child pornography laws.[98]

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[93] Near v. Minnesota, 283 U.S. 697, 1 Media L. Rep. 1001 (1931).

[94] 492 U.S. 115, 16 Media L. Rep. 1961 (1989).

[95] *Id.*, at 1968.

[96] No. Civ. A. 96-963 (E.D. Pa. Jun. 11, 1996).

[97] *Id.*

On its face, the New York law appears likely to be found unconstitutionally overbroad because of its similarity to the CDA. However, there is an important difference between the two statutes that may allow the New York statute to pass constitutional muster. In particular, the statute states that

> [I]t is an affirmative defense that the persons to whom allegedly obscene or indecent material was disseminated . . . consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing, disseminating, or viewing the same.[99]

The Oklahoma statute, however, takes a much narrower view of "harmful to minors." Therefore, it is narrowly tailored, but as mentioned previously, it may duplicate existing laws.

The Virginia statute uses the broad term "sexually explicit material." It is likely to encompass a great deal of material with educational, scientific, and literary value, but this overbreadth is tempered somewhat by the law's limitation to state employees using state-owned computers. The Virginia law may, however, constitute an unconstitutional prior restraint which would result in chilling speech by certain state employees, including university professors, researchers, and social workers. The ACLU of Virginia plans to challenge this law as a prior restraint on protected speech and an impermissible restriction of First Amendment rights.[100] The

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[98] *Id.*

[99] S. 210-E, (N.Y. 1996) <http://assembly.state.ny.us/cgi-bin/showtext?billnum=200210>.

[100] *American Civil Liberties Union Cyber-Liberties Update*, July 1996 <http://www.aclu.org/ issues/cyber/upjulya.html>.

ACLU is preparing to file federal and state lawsuits against the Virginia statute on behalf of six plaintiffs who are university researchers.[101]

LEGAL FRAMEWORK OF INTERNET CONTENT REGULATION

Although the electronic media enjoy First Amendment protection, they are subject to content-based restrictions that would be unconstitutional if applied to the print media.[102] Not all restrictions on the electronic media, however, can pass constitutional muster. In the early stages of the development of cyberspace law, legislators have tended to apply the broadcast framework to cyberspace.[103] At the same time, the courts have been less sanguine about simply transferring this framework to the new medium. This section examines the rationales for applying the broadcast model of indecency regulation to the Internet by tracing a series of indecency regulation[104] cases, analyzing the legal reasoning underlying the courts' decisions, and discussing in what ways these decisions are relevant to cyberspace regulation.

In *FCC v. Pacifica Foundation*, a landmark media regulation case based on a radio listener's complaint about a broadcast of George Carlin's "Filthy Words" monologue, the

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[101] Telephone interview with Kent Willis, Executive Director of the ACLU of Virginia (Nov. 12, 1996).

[102] ZELEZNY, *supra* note 26, at 238.

[103] The Supreme Court's scarcity rationale is the main justification for various forms of broadcast regulation, including content regulation. This rationale, based on the idea that government may regulate scarce broadcast frequencies as a public service, does not seem to justify regulating the Internet, which has a different and virtually unlimited infrastructure. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 1 Media L. Rep. 2053.

[104] *See generally* John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U.L. REV. 329 (1989) (offering a critical analysis of attempts to expand the reach of the FCC indecency policy beginning in the mid-1980s).

Supreme Court ruled for the first time that the government has the power to regulate indecent speech without impinging on First Amendment rights.[105] In its decision, the Court acknowledged the differential constitutional protection granted to the various media, stating that "it is broadcasting that has received the most limited First Amendment protection."[106] The Court cited two characteristics of broadcast media that made it more susceptible to government regulation: (1) its "uniquely pervasive presence" and; (2) its unique accessibility to children, "even those too young to read."[107] Writing for the Court, Justice Stevens implicitly recognized the limitations of government regulation of indecency. Stating that "context is all-important" in the decision to regulate, Stevens listed several variables that may influence the decision, including the time of day, the context of the program in which the "indecent" speech is used, and differences between radio, television, and other media.[108] The Court's reasoning in *Pacifica* can be summed up as the "nuisance rationale" in which the context of the speech is an essential element in determining government's power to regulate.[109]

Attempting to apply the *Pacifica* rationale to cyberspace, as the drafters of the CDA did,[110] reveals serious differences between the two media. The two characteristics of broadcasting used by the Court to justify its regulation of radio and television simply do not exist in cyberspace, at least not to the extent that they do in broadcasting. The broadcast media were viewed by Court as pervasive because

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[105] 438 U.S. 726, 3 Media L. Rep. 2553 (1978).

[106] *Id.*, at 2561.

[107] *Id.*, at 2562.

[108] *Id.*

[109] *Id.*

[110] Harvey Berkman, *Medium is Message: Courts Say Congress Goofed in CDA Focus on Smut, Not the Internet,* THE NAT'L L.J., Aug. 19, 1996, at 1.

> indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of the intruder.[111]

In the view of the Court, radio and television broadcasts are pervasive and intrusive. Unlike broadcast media, however, the Internet currently has a more limited presence in private homes, and the individual user has a high degree of control over the content that he or she views.[112] The second characteristic, accessibility to young children, though present, is tempered by the fact that the Internet is an interactive medium, unlike radio and television. It is difficult to navigate cyberspace without some reading ability and basic computer skills. Consequently, cyberspace cannot intrude on the youngest children in the ways that television and radio can.

The CDA's drafters were also guided by another Supreme Court case, *Sable Communications v. FCC*,[113] in writing the federal ban on indecency in cyberspace. Although the Court ruled against the FCC in this dial-a-porn case, it affirmed that the government has a legitimate interest in shielding minors from indecent material. The government may ban indecency provided it does so "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."[114]

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[111] *Pacifica*, 438 U.S. 726, 3 Media L. Rep. 2562.

[112] *See* ACLU v. Reno, No. Civ. A 96-963 (E.D. Pa. Jun. 11, 1996) (the "Findings of Fact" section gives an excellent, concise overview of the Internet, including its current level of pervasiveness).

[113] 492 U.S. 115, 16 Media L. Rep. 1961 (1989).

[114] *Id.*, at 1966.

In the end, *Sable* did not bode well for the CDA proponents. Judge Dalzell in *ACLU v. Reno* interpreted the *Sable* decision that the dial-a-porn ban was unconstitutional as a narrowing of *Pacifica*.[115] Dalzell pointed out that the *Sable* Court found *Pacifica* an "emphatically narrow" holding arising out of the "unique attributes of broadcasting."[116] Such a reading of *Pacifica* clearly suggests that the government's justification for regulating the broadcast media does not necessarily translate into a justification for regulating other media.

Also, *Sable* ruled that to be found constitutional, indecency regulations must: (1) be narrowly drawn and; (2) not limit adults to speech that is only suitable for children. The Court concluded that:

> Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny.[117]

In *Sable*, the Supreme Court asserted that the government could not limit adults to material that is fit only for children, when other solutions exist for keeping the material out of the reach of children.[118]

The Supreme Court in *Turner Broadcasting System, Inc. v. FCC*[119] declined to adopt the broadcast rationale for cable television, in effect implicitly limiting further the reach of the

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[115] ACLU v. Reno, No. Civ. A 96-963 (E.D. Pa. Jun. 11, 1996), at 39.

[116] *Id.* (citations omitted).

[117] *See Sable*, 492 U.S. 115, 16 Media L. Rep. at 1968.

[118] *Id.*

[119] 512 U.S. 622, 22 Media L. Rep. 1865 (1994).

Pacifica decision.[120] In *Turner* the Court ruled that cable television possessed the same First Amendment shield as print media. [121] Judge Dalzell interpreted the *Turner* decision as both an indication of the erosion of *Pacifica*'s reach and a confirmation that "the analysis of a particular medium of mass communication must focus on the underlying technology that brings the information to the user."[122] John Zelezny noted that the Supreme Court's ruling in *Turner* "suggests that full First Amendment protection against regulation should apply to the Internet."[123]

Also useful in defining the framework of Internet regulation is a Court of Appeals case in which the court said the *Pacifica* case is not applicable to cable television because of significant differences between cable and over-the-air broadcasting.[124] The court ruled that cable television is not pervasive and does not intrude into the home; rather, the subscriber must make an affirmative decision to receive cable. Also, cable television is not as accessible to children as broadcast television because parental controls are available (such as a choice of cable services and lockboxes).[125] The Internet is arguably even less pervasive and less accessible to children than cable television. Therefore, it cannot constitutionally be subject to governmental indecency prohibition.

The years since *Pacifica* have witnessed a series of cases in which the courts interpreted *Pacifica* narrowly and in effect strengthened First Amendment protection for cable television and other non-broadcast media. *Sable Communications v. FCC* established that the government can only regulate indecent "dial-a-porn" communications "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."[126] *Turner* demonstrated the Court's refusal to apply the rules of broadcast to cable television, indicating that the nature of the medium is of primary importance in determining the constitutionality of indecency regulation.[127] Similarly, *Cruz* established that the broadcast model of regulation does not apply to cable because of significant technological differences.[128] Cumulatively, these cases suggest that government attempts to regulate the Internet based on the *Pacifica* model will likely be found unconstitutional.

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[120] ACLU v. Reno, No. Civ. A 96-963 (E.D. Pa. Jun. 11, 1996), at 39.

[121] ZELEZNY, *supra* note 26, at 498.

[122] ACLU v. Reno, No. Civ. A 96-963 (E.D. Pa. Jun. 11, 1996), at 39.

[123] ZELEZNY, *supra* note 26, at 498.

[124] Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985).

[125] *Id.*

SUMMARY AND CONCLUSIONS

To summarize, statutory analyses of legislation in New York, Oklahoma, and Virginia reveal that legislators have taken a wide range of approaches to regulating indecency in cyberspace. The New York statute closely resembles the CDA, except that it adopted the narrower "harmful to minors" standard and included some additional defenses. The Oklahoma law also uses the "harmful to minors" standard, but defines it narrowly, in the same terms used in the *Miller* definition of obscenity. Virginia's statute covers the broadest range of material ("sexually explicit"), but is limited to state employees using state-owned computers.

The constitutional issues raised by the state legislation reflect the divergent language and scope of the laws. Because the Oklahoma law regulates obscenity, it does not pose constitutional problems. The New York and Virginia laws, however, attempt to regulate speech protected by the First Amendment. To be constitutional, these statutes must serve a compelling government interest and they must be narrowly tailored. The constitutionality of the New York statute may rest on the court's interpretation of the "harmful to minors" standard, which is generally regarded as narrower than the indecency standard. Specifically, is "harmful to minors" unconstitutionally vague? If not, is it too broad? If the courts answer in the affirmative to either of these questions, the statute is likely to be struck down. In addition to these types of issues, the Virginia law raises the question of the constitutionality of prior restraints.

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[126] Sable Communications of California v. FCC, 492 U.S. 115, 16 Media L. Rep. 1966 (1989).

[127] Turner Broadcasting System v. FCC, 512 U.S. 622, 22 Media L. Rep. 1865 (1994).

[128] Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985).

The CDA and the state legislation examined in this paper represent governments' first efforts to regulate content in this new and changing medium. Congress and the state legislatures have attempted to apply the broadcast model of regulation to cyberspace. Such attempts are perhaps an inevitable stage in the growth of the Internet. In the three years since the advent of the World Wide Web made cyberspace widely available to the public, the Internet has rapidly developed into a communications medium with widespread political, social, economic, and educational impact. Cyberspace law, however, is in its infancy and struggling to keep up with the burgeoning communications technology.

The new technology promises to converge the separate media of cable television, telephone, and computer to deliver personalized, interactive, multimedia communications services.[129] Such a convergence has far-reaching, perhaps revolutionary, implications for media law. One possible outcome of this media convergence is a rethinking of the prevailing model of content regulation in which the print media enjoys greater First Amendment protection than the electronic media. However, in the present regulatory climate, it is difficult to predict whether the

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[129] ZELEZNY, *supra* note 26, at 482.

Internet will be given the full First Amendment protection it deserves. Although the Supreme Court has refused to apply the broadcast model of content regulation to nonbroadcast media, Congress and some state legislatures are eager to regulate indecency, not just obscenity, on the Internet.

Congress and the legislatures of New York, Oklahoma, and Virginia are the first governing bodies to actually pass such regulation. The Congressional effort was found unconstitutional by two panels of federal judges, and enforcement of parts of the Communications Decency Act was enjoined. In March, the Supreme Court heard oral arguments in the appeal of the preliminary injunction in *ACLU v. Reno*. Thus, the Supreme Court has its first opportunity to consider how traditional free speech principles should be applied to the Internet. Meanwhile, states like New York, Oklahoma, and Virginia are proceeding with their own attempts to regulate the Internet with statutes similar to the CDA. Whether the differences between the CDA and these efforts will convince the courts that these statutes are constitutional remains to be seen.

The future of indecency in cyberspace will be determined largely by the Supreme Court's ruling in *Reno v. ACLU*. CDA opponents were optimistic after oral arguments in March, when the justices' questions indicated an appreciation of the Internet's distinctive qualities as a medium, qualities that separate it from broadcast and cable where the government is allowed to restrict some speech.[130] One of the most compelling advocates of the Internet to emerge from the CDA litigation has been Judge Dalzell, who called the Internet "the most participatory form of mass speech yet developed."[131] As such, it deserves the same freedom enjoyed by the print media. Extending full First Amendment protection to the Internet will not only protect free speech in cyberspace, but will also help to diversify and democratize the "marketplace of ideas," giving this longstanding ideal of First Amendment theory the chance to become a reality.

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[130] *Supreme Court Seems Skeptical of Decency Act, supra* note 5.

[131] ACLU v. Reno, No. Civ. A 96-963 (E.D. Pa. Jun. 11, 1996).

OF JELLYFISH AND COMMUNITY LEADERS:
REDEFINING THE PUBLIC FIGURE IN LIBEL LITIGATION

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OF JELLYFISH AND COMMUNITY LEADERS: REDEFINING THE PUBLIC FIGURE IN LIBEL LITIGATION

(An Abstract)

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Public-figure libel plaintiffs must prove that the defamatory statements were made with actual malice. The rationale for imposing such a heavy burden of proof on public figures is that they exert great influence over affairs about which the general public deserves to be informed. Currently, courts have defined public figures as those who have become celebrities or those who have voluntarily assumed a prominent role in a pre-existing public controversy. These definitions are inconsistent with the rationale for requiring public figures to prove actual malice. The definitions confuse celebrity or notoriety with influence, ignore the possibility that powerful persons may influence public affairs from outside the spotlight, and place investigative reporting at greater risk than routine reporting. Courts should abandon the existing definitions of public figure in favor of one that would recognize as a public figure any person who is involved in a matter of public or general interest and who occupies an influential position in the community, has a reputation for influencing important decisions or is deeply involved in the decision-making process. These criteria would better protect the First Amendment values the Supreme Court sought to protect in New York Times v. Sullivan.

(198 Words)

OF JELLYFISH AND COMMUNITY LEADERS: REDEFINING THE PUBLIC FIGURE IN LIBEL LITIGATION

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Legal scholar Frederick Schauer once observed that doctrines locate the terrain on which legal battles are fought and, thereby, channel litigation into certain questions and away from others. In the area of libel litigation, Schauer said, constitutional protections for expression have channeled litigation away from questions of truth, defamation, and common-law privileges and toward such matters as when a publication is made with reckless disregard of falsity or who is a public figure.[1] Legal doctrines may also channel the behavior of those affected by the law,[2] and that may be especially true of the public figure doctrine.

Schauer noted the definitions of public figure used in libel litigation seemed to lump together movie stars, famous athletes, and politicians.[3] This unfortunate combination of characters may be encouraging the much lamented convergence of the mainstream news media with the supermarket tabloids.[4] The tabloids made their reputations by breathlessly covering the trivial doings of movie stars. Mainstream media have started doing the same for the private lives of public leaders. Before the 1980s, events in the private lives of public leaders became matters for general discussion only when they affected public performance. That changed in 1987 when the press reported that presidential candidate Gary Hart was having an affair with a young model, Donna Rice.[5] Now even major news organizations energetically, if not always wisely, delve into the affairs of any person who reasonably can be considered a public figure. The attention devoted to the sexual assault charges brought against sports broadcaster Marv Albert[6] and the fascination with the marital problems of television star Kathy Lee Gifford and her former sports hero husband, Frank,[7] are examples of this trend. The willingness of mainstream media to pursue and report stories about the sex lives of celebrities shows that the line between news and gossip has become blurred.[8]

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[1] Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1984).

[2] *Id.*, note 1.

[3] *Id.* at 916-18.

[4] HOWARD KURTZ, MEDIA CIRCUS: THE TROUBLE WITH AMERICA'S NEWSPAPERS 145-50 (1993); Howard Kurtz, *Tabloid Journalism's Scoops for Scandal*, WASH. POST, Sept. 16, 1996, at D1; J. Peder Zane, *Liz's Love Life' Oprah's Diet' Dole's Foreign Policy'*, N.Y. TIMES, Sept. 29, 1996, Sec. 4 at 2; J. Peder Zane, *Tabloid Invasion of the Capital Under Way'*, BERGEN (N.J.) RECORD, Nov. 4, 1996, at Y1; and Paul D. Colford, *Tabloids Lose Readers, Aliens Held Blameless*, DALLAS MORNING NEWS, Oct. 16, 1996, at 12C.

If editors and producers assigned and selected news stories only on their merits, then many of the trivial, gossipy stories might never appear. Other factors, however, affect news decisions. News executives bring a range of presumptions and predispositions to the task of deciding what is news. The presumptions are not ideological, as some media critics like to believe; rather they are shaped by the economic and craft realities of the news business. One factor that enters into the newsworthiness calculations journalists make is whether the story is "safe," meaning that it is unlikely to provoke a lawsuit.[9]

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[5] KURTZ, MEDIA CIRCUS, *supra* note 4. Although no one showed that Hart's affair affected his performance of his official duties, some argued it reflected poorly on his character and, therefore, on his fitness for high office.

[6] Linda Stasi, *Trying Trysts: When Private Parts Become Public Spectacles*, THE VILLAGE VOICE, June 10, 1997, at 20.

[7] *Marriage Withstands Tabloid, Gifford Says*, CHICAGO TRIBUNE, June 4, 1997, at 2.

[8] Zane, *Tabloid Invasion*, *supra* note 4.

For journalists, nothing is safer than reporting on public figures. Because of a series of U.S. Supreme Court libel decisions starting with the 1964 landmark New York Times v. Sullivan,[10] public figures rarely win libel suits. Even when a clearly defamatory statement has been published and even when the news organization committed egregious errors in gathering or writing the news, the public figure still cannot recover damages. To win a libel suit, a public figure must prove actual malice, meaning that the publisher of the defamatory falsehood knew that the statements were false or had a high degree of awareness of their probable falsity.[11] The *Sullivan* rule requires public figures to present clear and convincing evidence that the publisher was subjectively aware of the falsity or probable falsity of the statement at the time of publication. Although the burden is not an impossible one, it is demanding enough that most public figure plaintiffs lose libel cases, either on appeal or at trial.[12]

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[9] Carlin Romano, *The Grisly Truth About Bare Facts*, *in* READING THE NEWS 38-78 (Robert Karl Manhoff and Michael Schudson, eds., 1986).

[10] 376 U.S. 254 (1964).

[11] This definition of actual malice combines elements of definitions from several Supreme Court decisions. *Sullivan* defined actual malice as knowledge of falsity or reckless disregard for whether the statements were false. 376 U.S. at 280. Later decisions elaborated on the meaning of reckless disregard. Garrison v. Louisiana, 379 U.S. 64, 74 (1964), defined reckless disregard as having a "high degree of awareness of [the] probable falsity" of the publication. Later, in St. Amant v. Thompson, 390 U.S. 727, 731 (1968), the court said reckless disregard meant publishing when the defendant "in fact entertained serious doubts as to the truth" of the publication. What the Supreme Court has repeatedly explained, and what the definition above emphasizes, is that the actual malice standard requires the plaintiff to prove that the defendant was subjectively aware of falsity or probable falsity at the time the defamatory statement was published. *See* Herbert v. Lando, 441 U.S. 153, 157 (1979).

The Supreme Court created the *Sullivan* rule to protect citizen critics of government officials from libel suits that would prevent them from expressing facts and opinions they believed were true but which would be difficult to prove true in a court of law. The court later extended the rule to apply to public figures, people who are not in government but who influence public affairs. The court, however, defined "public figures" in ways that emphasize celebrity over substance. As a result, news organizations may find it safer and more profitable to report on the sex lives of entertainers, athletes, and government leaders than to report on how corporations threaten the environment, undermine public health, influence government decisions or twist tax policies for their short-term interests. Stories about the sex lives of movie stars concern only public figures who must prove any defamatory statements were made with actual malice, and sex is easy for reporters to understand, limiting the possibilities for error. Stories about health, the environment, or taxes involve people who may or may not be public figures and are so inherently complex that the possibility of error is multiplied, as is the possibility of facing and losing a libel suit. These factors enter into the calculations editors and producers make about what stories to cover.

The idea that the definition of public figure will influence the conception of what editors consider suitable material for public discussion possesses some intuitive validity.[13] Nevertheless, the extent to which this is so is a topic for another paper. The point here is that by defining public figures as it has, the Supreme Court has departed from the constitutional foundation on which it based its decisions limiting libel actions by public plaintiffs. This paper will examine the First Amendment rationales for the actual-malice rule and the public-figure standard. It will also review the criticisms of the court's definitions of public figure and show how those definitions conflict with First Amendment values. Finally, the paper will suggest a new set of criteria for defining public figures that will be more consistent with the constitutional foundation of *Sullivan*.

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[12] Randall P. Bezanson, Gilbert Cranberg and John Soloski, Libel Law and the Press: Myth and Reality 118-20 (1987). This study of libel and privacy cases between 1974 and 1984 found that plaintiffs who must meet the Sullivan test prevail only 10 percent of the time. Plaintiffs who did not have to meet that burden won 18 percent of their cases. An earlier study by Marc A. Franklin (*Winners and Losers and Why: A Study of Defamation Litigation*, 1980 Am. B. Found. Res. J. 455, 493) found a somewhat more balanced result -- 29 percent of cases were decided in favor of the plaintiff.

I. Development of Constitutional Protections from Libel Suits

The *Sullivan* rule emerged as a byproduct of the civil rights movement of the 1960s. The case involved an advertisement that appeared in the March 29, 1960, *New York Times* and complained that civil rights workers and African-American students in Montgomery, Ala., had been harassed and persecuted by unnamed public officials. The advertisement mentioned the police and strongly implied that their treatment of civil rights protesters had been harsh and repressive. The Montgomery city commissioner with responsibility for overseeing the police, L.B. Sullivan, sued for libel, even though his name never appeared in the advertisement.[14] A trial court awarded damages of $500,000 to Sullivan, which the Alabama Supreme Court affirmed. The Alabama high court said the advertisement would injure Sullivan's reputation as public affairs commissioner because the public would read criticism of the police department as applying to the public official responsible for its conduct.[15]

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[13] Most professional journalists would consider the editor or reporter who did not weigh the risk of a libel suit an extremely imprudent steward of her employer's investment. Furthermore, most journalists have received some training in libel law, either as students in a college or university or as professionals. It seems reasonable to presume they are required to receive such training in the hope it will influence their journalistic decisions.

[14] 376 U.S. at 256-60.

Before 1964, the U.S. Supreme Court had left libel law in state hands. Sullivan's lawsuit, however, threatened not only the *Times'* pocketbook but also the nation's and the court's commitment to civil rights. The lawsuit was one of dozens of pending libel suits, most arising from coverage of civil rights issues, brought by southern officials against northern news organizations. A decision in Sullivan's favor would discourage the press from reporting on and the public from criticizing efforts by local officials in southern states to resist the civil rights movement. More broadly, a victory by Sullivan would expose almost any criticism of official conduct to libel suits.[16] The effect would be a resurrection of the doctrine of seditious libel, which the nation had abandoned in the wake of the 1798 Sedition Act crisis.[17]

The Supreme Court said Sullivan's lawsuit threatened the national commitment to vigorous debate over public issues, even when that debate called into question the motives and reputations of the public people involved in those issues.[18] To protect the national tradition of rough-and-tumble debate of public issues, the Supreme Court said public officials who sue for libel must prove more than the traditional elements of a libel action: defamation, publication and identification. They must also prove that the defamatory statements were published with actual malice, meaning the knowledge that they were false or with reckless disregard for whether they were false.[19] Implicit in that standard is the requirement that the public official libel plaintiff must produce proof that the statement was false (reversing the long-held presumption of falsehood which required the defendant to prove truth) and that the defendant was subjectively aware of the falsity.

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[15] *Id.* at 254, 262-63.

[16] *Id.* at 292.

[17] *Id.* at 273-77.

[18] *Id.* at 269-70.

Justice William Brennan's majority decision spoke only of public officials, a term he did not bother to define.[20] Although the scope of the term "public official" is not entirely clear, it nevertheless suggests a fairly limited range of potential libel plaintiffs. The Supreme Court soon had to grapple with the question of whether other plaintiffs, not public officials, but people deeply involved in public issues, should have to prove actual malice in libel suits. The court confronted the question when it considered libel suits brought by Wally Butts against the Curtis Publishing Co. and by Edwin A. Walker against the Associated Press.[21]

Butts was the head football coach and athletic director at the University of Georgia, and although the university is a public institution, the athletic director was employed by a private corporation. Walker was a retired Army general who had publicly opposed the racial integration of the University of Mississippi.[22] The justices agreed that both men were public figures. They also agreed that public figure libel plaintiffs should have to prove a higher degree of fault than private individuals to recover damages, but the justices disagreed over what that level of fault should be.[23] Justice John Marshall Harlan, the author of the plurality opinion, noted that criticism of private individuals who seek to influence public affairs is of as much interest to the general public as criticism of public officials. If the one form of criticism is to enjoy protection from libel suits, then so should the other.[24] Chief Justice Earl Warren went further, arguing that the blurring of lines between public and private sectors left no basis in "law, logic or First Amendment policy" for a distinction between public officials and public figures.[25] Both justices seemed to agree that private individuals become public figures by playing crucial roles in matters of public concern. Their status as private individuals diminishes neither the importance of the matters with which they are involved nor the public's need for information. Neither justice attempted to define "public figure."

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[19] *Id.* at 279.

[20] *Id.* at 283, note 23.

[21] The two cases were decided together as Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

After a brief flirtation with the idea that the distinction between public and private figures should be scrapped in favor of a system that would apply the *Sullivan* standard anytime the defamatory statements involved a matter of public or general interest,[26] the Supreme Court in Gertz v. Robert Welch Inc.[27] clearly held that public figures would have to prove actual malice, as do public officials. But so long as states did not expose publishers of defamatory falsehoods to liability without fault, they could allow private persons to recover damages by satisfying a less demanding standard of fault than actual malice.[28] As a practical matter, this meant states were free to adopt a negligence standard for private-figure libel plaintiffs. The *Gertz* majority added, however, that even private figures could not recover punitive damages except on a showing of actual malice.[29] Justice Lewis Powell, author of the majority opinion, advanced two rationales for distinguishing public and private plaintiffs: The public figure generally has more access to the mass media and is better able to contradict defamatory falsehoods than is the private individual, and the public figure has voluntarily assumed the risk of exposure to the public and closer scrutiny of his or her activities.[30]

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[22] *Id.* at 135 and 140.

[23] Justice John Marshall Harlan's plurality opinion argued that public figures who are not public officials should have to prove that the defendant displayed "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. Chief Justice Earl Warren said public figures should have to prove actual malice, as defined in the New York Times v. Sullivan decision. *Id.* at 164. Although they did not join Warren's opinion, Justices Hugo Black, William O. Douglas, William Brennan and Byron White concurred with the Chief Justice on this point. *Id.* at 170 (Black concurring, joined by Douglas) and 172 (Brennan concurring, joined by White).

[24] *Id.* at 148.

[25] *Id.* at 163.

The *Gertz* approach created two very different tracks for libel plaintiffs: a demanding standard for public officials and public figures and a much lower standard for private figures.

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[26] Rosenbloom v. Metromedia, 403 U.S. 26, 31 (1971).

[27] 418 U.S. 323 (1974).

[28] *Id.* at 347.

[29] *Id.* at 349.

[30] *Id.* at 344.

Because the public-figure plaintiff's burden was so much greater than that of a private person, it was obvious that the status of the plaintiff would have a profound impact on the outcome of the case. The Supreme Court had to provide some guidance for lower courts to help them recognize public figures. Powell's opinion described three types of public figures: the involuntary, the pervasive and the limited.[31]

Powell said public-figure status should depend, as far as possible, on the voluntary conduct of the plaintiff. This, he believed, would provide a criterion judges could easily recognize and apply in a variety of cases.[32] Therefore, he concluded that the involuntary public figure must be an exceedingly rare creature, almost to the point of nonexistence. The second category consists of people who have "assumed roles of especial prominence" in society and have acquired such "persuasive power and influence" as to be public figures for all occasions.[33] Such general-purpose public figures are relatively rare, too. The final category is those people who have "thrust themselves to the forefront of a particular public controversy" with the aim of influencing the resolution of that controversy.[34] These limited-purpose public figures are the most numerous of the three types.

Powell's application of the public-figure criteria to the facts of the *Gertz* case makes it clear that he saw them as a demanding test that few would satisfy. Elmer Gertz, a Chicago lawyer, sued Robert Welch Inc., a right-wing organization that published the magazine *American Opinion*. The magazine had defamed Gertz in an article discussing the criminal prosecution of a Chicago police officer who had shot and killed an African-American youth. Gertz was representing the youth's family in a civil action against the officer.[35] Powell said that although Gertz had long been active in community and professional activities in Chicago and had written several books and articles on legal matters, he did not have the "general fame or notoriety in the community" that would make him a public personality for all purposes. Nor was Gertz a limited-purpose public figure. He had played no role in the criminal prosecution of the police officer and had never discussed the case with the media. In short, he had not thrust himself into the vortex of the controversy.[36]

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[31] *Id.* at 345.

[32] *Id.* at 343-46.

[33] *Id.* at 345.

[34] *Id.*

II. Criticisms of the Public Figure Standards

The *Gertz* decision found support from some scholars who feared that the Supreme Court had nearly extinguished protection for personal reputation in its efforts to protect press freedom. David W. Robertson, for instance, found the *Gertz* formula for balancing reputational and First Amendment interests satisfactory because the Supreme Court seemed to have construed the public-figure categories very narrowly. Only persons with broad name recognition could be general-purpose public figures, and limited-purpose public figures must have undertaken some voluntary action directly intended to bring them into the public eye. Only in these cases, Robertson argued, does the influence the public figure exerts warrant the imposition of a strong media check on their power.[37]

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[35] *Id.* at 325-26.

[36] *Id.* at 352.

More frequently, however, scholars have faulted *Gertz* rather than praised it. The scholarly critics have offered several bases for rejecting or modifying the *Gertz* criteria, among them imprecision, insufficient protection for the reputations of private individuals, a lack of theoretical clarity, failure to disengage the courts from the task of deciding what matters are of public interest, and failure to protect freedom of speech and the press.

Perhaps the most persistent criticism of *Gertz* has been that the definition of "public figure" is so vague as to invite arbitrary application. Chief Judge Lawrence of the U.S. District Court for southern Georgia may have expressed the problem most clearly in a decision he wrote in a 1976 libel case. The plaintiff was Lou Rosanova, the executive director of the Savannah Inn and Country Club. *Playboy* magazine had published an article that said he had participated in a long and secret conversation between Teamsters chief Frank Fitzsimmons and California mobsters. The whole case turned on the question of whether Rosanova was a public figure. After reviewing Rosanova's career, Lawrence decided he was public figure. But before he did so, Lawrence vented his exasperation at the difficulty of making the decision: "How and where do we draw the line between public figures and private individuals? They are nebulous concepts. Defining public figures is much like trying to nail a jellyfish to the wall."[38] Some scholars have complained that the general-purpose public figure category has become a catch-all, covering a wide range of plaintiffs -- artists, athletes, business people -- in an almost whimsical manner.[39] And still others have complained that courts have shown inconsistency in the way they determine limited-purpose public figure status, specifically by adopting various views on what constitutes voluntary exposure to the public. Does one have to act with the specific intent of attracting attention, or is it enough that one be engaged in an activity or pursuit likely to attract attention? Both views have found favor among the courts.[40]

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[37] David W. Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEXAS L. REV. 199, 224-25 (1976).

[38] Rosanova v. Playboy Enterprises, Inc., 441 F.Supp. 440 (S.D. Ga. 1976). See also Harry W. Stonecipher and Don Sneed, *A Survey of the Professional Person as Libel Plaintiff: Reexamination of the Public Figure Doctrine*, 46 ARK. L. REV. 303 (1993), a study of 39 libel cases involving plaintiffs who were either lawyers, physicians, teachers

Another line of *Gertz* criticism holds that the decision's public-figure/private-figure analysis provides too little protection for reputation. Frederick Schauer argues that the Gertz decision rested on a faulty archtype for the public figure.[41] The *Butts* court envisioned public figures as people who were intimately and consistently involved in the issues of the day. In fact, Schauer says, such people constitute only a small subclass of public figures. Most are entertainers, artists and sports heros whose lives and ideas have no impact on public policy. Treating such people the same as public officials makes little sense, Schauer contends.[42] He suggests that in such

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or clergymen, finding decisions going in both directions on the public-figure question with no consistency in result or rationale; and Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish*, 68 IOWA L. REV. 35, 81 (1982), a study finding inconsistency in the way courts classified corporate plaintiffs in defamation cases as public or private figures.

[39] James Corbelli, *Comment: Fame and Notoriety in Defamation Litigation*, 34 HASTINGS L. J. 809, 833 (1983).

[40] Erik Walker, *Defamation Law: Public Figures--Who Are They?* 45 BAYLOR L. REV. 955, 972 (1993).

[41] Schauer, *Public Figures*, *supra* note 1.

[42] *Id.* at 913-21.

cases, legislatures could be trusted to draw lines that would provide more protection for reputation while still preserving freedom to discuss matters relating to self-government.[43]

Still others have complained that the *Gertz* decision lacks theoretical clarity because whether the plaintiff is a public figure bears little or no relationship to the value of the speech or its truthfulness. One study of libel litigation found that in 84 percent of such cases the major issue is constitutional privilege, meaning the plaintiff's status as a public official or public figure or the application of the privilege to the facts of the case. The authors of this study said the status of the plaintiff as a public figure bears little or no relationship to the value of the speech or its truthfulness. As a result, libel litigation focuses on issues that are largely irrelevant to the central ones in a defamation action: whether the speech is true and whether it harmed the plaintiff.[44]

Several commentators have noted that the *Gertz* test does not accomplish its stated goal of relieving the courts of the task of deciding whether a matter of public or general concern is involved. The test for a limited-purpose public figure requires finding that the plaintiff was involved in a public controversy. In effect, the *Gertz* analysis includes a sub rosa public interest test. The fact that courts are engaging in public-interest analyses allows them to manipulate the test to achieve a desired result. Reputational interests, under this regime, may be sacrificed unnecessarily in situations where the public interest in the speech is low but the plaintiff satisfies other public-figure criteria.[45]

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[43] *Id.* at 925-28. For a similar argument *see* Joan E. Schaffner, *Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation*, 63 SO. CAL. L. REV. 433, 464-65 (1990). Schaffner says purpose of the actual malice rule is to assure the public it will have information it needs about government affairs, but a privilege to defame movie stars and athletes contributes nothing to this goal. And the limited-purpose public figure category acts as a disincentive for private individuals to become involved in public affairs.

[44] BEZANSON, ET AL., *supra* note 12 at Chapter 6. For a similar argument see Robert S. Gilmore, *Attacking the Negligence Rule in Defamation of Private Plaintiffs:* Embers Supper Club v. Scripps Howard Broadcasting Co., 47 OHIO ST. L.J. 503, 514-16 (1986).

Finally, there is a group of *Gertz* critics who find that the court struck a balance that inadequately protects freedom of the press. Donald M. Gillmor argues that the tendency of some courts to classify public plaintiffs as private undermines the values the *Sullivan* decision sought to advance.[46] Gillmor would allow no libel suits by policy-making public officials or pervasive public figures (celebrities) where the publisher or broadcaster of a defamatory statement offered the defamed party an opportunity to reply.[47] Another author has read the narrowness of the public figure categories as evidence that the court intended to limit press freedom and increase self-censorship. Uncertainty over who is a public figure necessarily will force many media organizations to refrain from publishing information of relevance to public affairs.[48] Finally, several commentators have contended that the negligence standard inadequately protects the press. *Gertz* held that requiring proof of negligence in cases involving private figures would assure that the plaintiff would always have to prove some degree of fault. Critics respond that the negligence standard easily erodes into strict liability. If the plaintiff can prove falsity, juries sometimes presume negligence without considering the defendant's evidence that it took the requisite degree of care.[49]

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[45] Eileen Carroll Prager, *Note: Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157, 177-78 (1977). Among others making this observation are Gilmore, *supra* note 41, 513-14 and Gerald G. Ashdown, Gertz *and* Firestone: *A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 683-84 (1977).

[46] DONALD M. GILLMOR, POWER PUBLICITY AND THE ABUSE OF LIBEL LAW, 1992, pp. 142-43.

[47] *Id.* at 6-7.

[48] Ashdown, *supra* note 45, 680-85.

III. Who Are the General-Purpose Public Figures?

Gertz vaguely defines the general-purpose public figure as someone with wide-ranging persuasive power and influence. Lower courts have tried to make the definition clearer and easier to apply. One attempt defines a general-purpose public figure as one who is a celebrity or a household name and whose words and deeds are followed by the public. Evidence of whether a person has attained that status may be found in surveys, previous press coverage, efforts of the plaintiff to seek or avoid publicity and the success of those efforts, and whether others may alter their opinions or conduct in light of what the plaintiff says or does.[50] Another attempt defines a general-purpose public figure as one whose name is immediately recognized by a large percentage of the relevant population, whose activities are followed with interest, and whose opinions and actions may be considered by others in framing their own opinions. The relevant population is defined by the audience reached by the defamation, and the plaintiff's fame must exist before the defamation was published.[51]

Either lower court definition satisfactorily resolves easy cases. For example, the Alabama

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[49] *Id.* at 516. *See also* M. David Shapiro, *Case Note: Torts--Defamation--Private Citizens Need only Show Negligence in Defamation Actions Against Media Defendants. Does This Stifle the Media at the Public's Expense?--* Miami Herald Publishing Co. v. Ane, 458 So. 2d 239 (Fla. 1984), 13 FLA. ST. U. L. Rev. 159, 179 (1985) and Barry F. Smith, *The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule*, 44 MONT. L. REV. 71, 82 (1983).

[50] Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980).

[51] Harris v. Tomczak, 94 F.R.D. 687 (E.D. Calif. 1982).

Supreme Court had no trouble determining that Jimmy Faulkner was a public figure for his libel suit against the *Mobile Press Register* over a 1975 news story on his financial dealings. Faulkner had been prominent in Alabama politics since the 1940s, had played key roles in Democratic National Conventions, was involved in several local businesses (including newspapers and radio stations), and had written news articles and editorials on important public issues. His list of public service involvements and service on government commissions and boards was extensive. Faulkner was so well known in his community that a junior college was renamed in his honor. Because of his range of activities and the number of people who knew of him and were likely to be influenced by him, the court said he was a general-purpose public figure.[52]

At the other extreme is the case of W. Garth Seegmiller, a Utah rancher accused of mistreating his horses. A television news report said Seegmiller's horses were malnourished and at least two colts had died during the winter. Seegmiller had no record of prior public exposure and no pervasive influence in the community. The only notoriety he ever had received was this television report, and the Utah Supreme Court said that alone would not make him a public figure.[53]

A common element in the definitions of general-purpose public figures is an emphasis on celebrity. Both stress name recognition and whether the plaintiff is one whose life and activities are followed by a substantial number of people.[54] For instance, Robyn Douglass, a minor actress and model, was found to be a public figure in her suit against *Hustler* magazine.[55] The basis for finding Douglass a public figure was the fact that she had posed nude for *Playboy* and had done so eagerly as a way of advancing her career.[56] Entertainers, such as Douglass, Johnny Carson,[57] and Wayne Newton,[58] are almost always found to be general-purpose public figures. Courts also tend to classify as public figures prominent athletes, such as a lineman for the Philadelphia Eagles,[59] a wide receiver for the Tampa Bay Buccaneers,[60] and a soccer player for the Denver Avalanche.[61]

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[52] Mobile Press Register, Inc. v. Jimmy Faulkner, 372 So. 2d 1282 (Ala. 1979).

[53] Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981).

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[54] *See* Cepeda v. Cowles Magazines and Broadcasting, Inc., 392 F.2d 417 (9th Cir. 1968). When the 9th Circuit Court of Appeals decided that baseball star Orlando Cepeda was a public figure for all purposes, it said:

> Such figures are ... numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done.

Although this is a pre-Gertz decision, it is still cited with some frequency by courts trying to determine whether a plaintiff is a general-purpose public figure.

[55] Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985). Douglass' suit was for false light invasion of privacy and commercial appropriation of her name and likeness. In connection with the false light claim, which requires proof of actual malice at least by public figures, the court examined her status as a public figure and specifically applied *Gertz* in reaching its decision.

[56] *Id.*

[57] Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).

[58] Newton v. NBC, 12 Med. L. Rptr. 1252 (D. Nev. 1985).

[59] Chuy v. Philadelphia Eagles, 595 F.2d 1265 (3rd Cir. 1979).

[60] Bell v. Associated Press, 584 F.Supp. 128 (D.D.C. 1984).

[61] Brooks v. Paige, 773 P.2d 1098 (Colo. Ct. App. 1988).

While courts have no trouble finding sports and entertainment celebrities to be general-purpose public figures, they struggle with the classification of others who may wield influence over public affairs but lack celebrity status. When Alabama businessman R.D. Hicks was accused of running a "local Mafia" and converting a lumber company's logs to his own use, he sued for defamation. Hicks had several business interests in the area and performed work for the county on a contract basis. More importantly, he was widely perceived as having substantial influence over local politics. Hicks even admitted that people around Stevenson, Ala., called him the local "Boss Hogg." Nevertheless, the Alabama Supreme Court said Hicks lacked the wide fame required of the general-purpose public figure.[62]

Businesses, business leaders and others whom one would expect to have even more influence than R.D. Hicks have been found to be private figures for purposes of libel suits. An Oregon newspaper, the *Willamette Weekly*, reported that the Bank of Oregon and its president, Homer G. Wadsworth, had engaged in certain wrongful financial transactions. When the bank and Wadsworth sued, the newspaper argued the plaintiffs were public figures, relying heavily on the notion that since banks are regulated businesses, their activities are of considerable public interest. The Supreme Court of Oregon rejected that reasoning. It said the bank lacked the pervasive involvement in the affairs of society that is the hallmark of the general-purpose public figure.[63] Among the many others who have been found to be private figures are the founder of a statechartered bank;[64] a British corporation that mines stone and makes railroad cars;[65] the authors of an internationally best-selling book on psychotherapy;[66] a former alderwoman, state senate candidate, beauty queen, and TV personality;[67] a founder of a religious organization and counselor of persons serving probation;[68] a prominent local attorney and leader of a political party;[69] an attorney who was an appointed municipal judge, appointed member of a state racing commission, and a vice-president of the state bar association;[70] and a high school wrestling coach widely admired for his coaching achievements.[71]

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[62] Mead Corp. v. Hicks, 448 So. 2d 308 (Ala. 1983). Boss Hogg, the villain in the 1980s television series *The Dukes of Hazzard*, was a public official and public figure who controlled most of the illegal and many of the legal activities in the fictional Hazzard County.

[63] Bank of Oregon v. Independent News, Inc., 693 P.2d 35 (Ore. 1985).

The *Butts* court rested its decision to recognize the category of public-figure libel plaintiffs on solid First Amendment grounds: If the actual malice rule provides breathing space for truthful speech about government and public officials, then it should also assure vigorous and informed discussion about influential private organizations and individuals whose decisions and actions have broad public impact. The definitions of the general-purpose public figure courts now use fail to foster this basic First Amendment value. They place at risk the reputations of celebrities like Robyn Douglass and Orlando Cepeda who may be widely known[72] but who do not affect public concerns except in the most indirect ways. Yet the definitions fail to recognize as general-purpose public figures those who wield real power but who avoid the limelight.

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[64] Sisler v. Gannett Co., 516 A.2d 1083 (N.J. 1986).

[65] Snead v. Redland Aggregates Ltd. 21 Med. L. Rptr. 1865 (5th Cir. 1993).

[66] Harris v. Tomczak, 94 F.R.D. 687 (E.D. Calif. 1982).

[67] Phyfer v. Fiona Press, 12 Med. L. Rptr. 2211 (N. Miss. 1986).

[68] Davis v. Keystone Printing, 9 Med. L. Rptr. 1712 (Ill. Ct. App. 1982).

[69] Marchiondo v. Brown, 8 Med. L. Rptr. 2233 (N.M. 1982).

[70] Hinerman v. The Daily Gazette Company, Inc., 423 S.E.2d 560 (W.Va. 1992).

[71] Milkovich v. News-Herald, 473 N.E.2d 1191 (Ohio 1984).

IV. Who Are the Limited-Purpose Public Figures?

Justice Powell believed that the limited-purpose public figure would be the largest of the three classes of public figures.[73] Even so, two elements of the *Gertz* definition of a limited-purpose public figure have been used to restrict membership in this classification: a public controversy must exist and the plaintiff must voluntarily assume a prominent role in settling that controversy.

Three cases that followed *Gertz* gave the Supreme Court the opportunity to demonstrate how limited the category of limited-purpose public figure would be. For one thing, those later cases made clear that the existence of a public controversy was a necessary prerequisite to public-figure status and that the definition of a "public controversy" would be a narrow one. In one case, the Supreme Court said the highly publicized divorce of a Palm Beach socialite was not a public controversy. The mere fact that the proceeding had attracted public interest did not elevate it to the status of public controversy.[74] The issue of Communist infiltration of the government was not a public controversy, the court said in another case, because everyone agreed it was bad.[75] Nor were the research grants a psychologist received from the federal government a public controversy. Although there may be a generalized concern about government spending, the Supreme Court said, that concern was not specific enough to make hitherto unknown grant decisions a public controversy.[76]

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[72] Celebrities are those who are known simply for being known. DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 57 (1961, 1972).

[73] *Gertz*, 418 U.S. at 345.

[74] Time, Inc. v. Firestone, 424 U.S. 448 (1976).

In the same three cases, the court seemed to set a demanding standard for proving a plaintiff had invited public attention in order to influence the outcome of the public controversy.[77] In the Palm Beach divorce case, the plaintiff had held press conferences to talk to reporters about her case. Nevertheless, the court said, no evidence showed that those press conferences could have influenced or were intended to influence the outcome of her trial. Furthermore, the plaintiff had not initiated the court proceeding but had been dragged into it involuntarily.[78] Also, a man who had pleaded guilty to contempt of court many years earlier had not thrust himself into any controversy over the investigation of American Communists since there was no evidence he had courted the contempt citation as a way of making a public statement.[79] And the research psychologist had not sought to influence public discussion over government spending when he applied for his federal grants.[80]

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[75] Wolston v. Reader's Digest Assn., Inc., 443 U.S. 157 (1979).

[76] Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[77] *Gertz*, 418 U.S. at 352.

[78] *Time, Inc.*, 424 U.S. at 454-55 and accompanying footnote.

[79] *Wolston*, 443 U.S. at 166-68.

Drawing on these decisions, lower courts have constructed more detailed definitions of the limited-purpose public figure. The District of Columbia Circuit Court of Appeals created a three-step test for determining whether a plaintiff is a limited-purpose public figure. The first step is to isolate a public controversy, a real dispute the outcome of which must affect some segment of the general public in an appreciable way. In deciding whether a public controversy exists, courts should not attempt to impose their prejudices as to whether a particular topic is a legitimate one for public debate. Instead they should look for evidence that the issue had been debated before the defamatory statement was published. The second step is to identify the plaintiff's role in the controversy. The plaintiff should have achieved some special prominence in the issue and not merely a tangential or trivial role. The final step is to determine whether the defamatory statement was germane to the plaintiff's involvement in the controversy.[81]

Another approach to defining the limited-purpose public figure has been suggested by a federal district court in California. This court says a limited-purpose public figure is one who has, by voluntary and intentional conduct, vigorously sought to influence public opinion in regard to a specific controversy. The controversy should be identifiable by the audience, and its resolution should be reasonably likely to affect persons other than the immediate participants. Furthermore, the defamatory statements must be reasonably related to the plaintiff's actions in connection with the public controversy.[82]

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[80] *Hutchinson*, 443 U.S. at 135.

[81] *Waldbaum*, 627 F.2d at 1296-98. The 2nd Circuit Court of Appeals has created a similar four-step test. This test requires the defendant to show that the plaintiff had (1) successfully invited public attention prior to publication of the defamation; (2) had voluntarily injected himself in the controversy; (3) had assumed a position of prominence in the controversy; and (4) had regular and continuing access to the media for responding to the defamation. Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123 (2nd Cir. 1984).

The definitions of the limited-purpose public figure are adequate for resolving clear cases, but their application to more perplexing cases has produced confusing and contradictory decisions. David Nadel and Carol Ruth Denney clearly qualified as limited-purpose public figures for their libel suit against the University of California. Nadel and Denney were leaders of a movement opposing plans by the university and the city of Berkeley to remodel Peace Park and install sand-pit volleyball courts and other recreational facilities. The opponents of the remodeling promised protests, vandalism, and riots -- all of which occurred. During the debate over the park, various university officials characterized the opponents as prone to violence and attempting to sabotage the park plan. Nadel and Denney sued for libel. In deciding that both plaintiffs were public figures, the court noted that they had engaged in a series of actions that put themselves at the center of the controversy. Both had spoken at city council meetings and had participated in press conferences and press interviews. Nadel had also written letters to the editor and engaged in a number of activities calculated to produce media coverage.[83]

A clear case of a person who was not a limited-purpose public figure was that of Lee Dresbach. In 1961, when Dresbach was 14, his parents were murdered by his brother, Wayne.

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[82] *Harris*, 94 F.R.D. at 703.

[83] Nadel and Denney v. The Regents of the University of California, 34 Cal. Rptr. 2d 188 (Calif. Ct. App. 1994). Another example of an easily decided case is Lawrence v. Bauer Publishing & Printing Ltd., 446 A.2d 469 (N.J. 1982), in which the court held that two leaders of a local taxpayers association that opposed appropriating money for a new firehouse were public figures.

Nearly twenty years later, Michael Mewshaw, who had been a friend of the Dresbachs about the time of the murder and whose sister later dated Lee Dresbach, wrote a book about the case. Dresbach contended the book had libeled him by suggesting he had conspired with his brother to kill their parents. The court said Dresbach was not a public figure. He apparently had not been involved in the crime, never took a position on any issue connected with it, and was not the focus of any controversy. As a 14-year-old, his involvement had consisted mostly of describing at the request of the police or the court what he had witnessed.[84]

Few cases present these extremes. Most libel plaintiffs neither lead vocal protest organizations nor live in near-isolation. Those who sue for libel often play some role in issues of general public interest, even if they do not lead or seek the spotlight. In dealing with these cases, courts often take one of two approaches. The first is to apply the *Gertz* criteria strictly, insisting on clear evidence that the plaintiff voluntarily took a prominent role in a public controversy that existed prior to the defamatory publication. The other approach holds that a plaintiff may become a limited-purpose public figures by engaging in a course of conduct that one might reasonably expect would attract public attention.

Courts that adhere strictly to the *Gertz* standards usually find these marginal plaintiffs private individuals. Charlotte White worked for Native America, Inc., as an organizer of Native American pow-wows. When she tried to organize a pow-wow in Manchester, Ky., she asked the city council to run water lines to the site of the event at a cost of $10,000. She promised the council the city would get the money back from pow-wow proceeds. When the *Manchester*

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[84] Dresbach v. Doubleday & Company, Inc., 518 F.Supp. 1285 (D.C.C. 1981).

Enterprise published an article saying White had written bad checks and had been jailed on fraud charges in connection with a Florida pow-wow, she sued for libel. A federal district judge ruled that White was not a limited-purpose public figure. Her one appearance before the city council did not prove she had thrust herself to the forefront of a public controversy.[85] Similarly, a Virginia bank, one of only two in Floyd County, was held to be a private figure for its libel suit against Veribanc, Inc., a company that gathers and distributes information about banks. Veribanc had erroneously reported that the bank was in danger of exhausting its equity before the end of the year. The 4th U.S. Circuit Court of Appeals held that even though banking is pervasively regulated and a subject of public interest, a business does not become a public figure simply by engaging in banking. Nor had the bank tried to draw public attention to its financial condition.[86] The 4th Circuit also held that a consulting firm evaluating archeological sites in Fairfax County, Va., in preparation for construction of a water intake facility was not a public figure. Although the location of the facility was a controversial and important matter, the court said the consulting firm was not responsible for making the decision and was relatively unknown at the time it was defamed in a newspaper story.[87]

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[85] White v. Manchester Enterprise, Inc., 871 F.Supp. 934 (E.D.Ky. 1994).

[86] Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681 (4th Cir. 1989).

[87] Arctic Company, Ltd. v. Loudon Times Mirror, 624 F.2d 518 (4th Cir. 1980). *See also* Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976); Greenberg v. CBS, 419 N.Y.S.2d 988 (N.Y. App. Div. 1979); Hodgins v. Times Herald Company, 425 N.W.2d 522 (Mich. Ct. App. 1988); *In re* IBP Confidential Business Documents Litigation: Bagley v. Iowa Beef Processors Inc., 797 F.2d 632 (8th Cir. 1986); Jadwin v. Minneapolis Star and Tribune Company, 367 N.W.2d 476 (Minn. 1985); Lake Havasu Estates, Inc., v. Reader's Digest Ass'n, Inc., 441 F.Supp. 489 (S.D.N.Y. 1977); Milkovich v. The News-Herald, 473 N.E.2d 1191 (Ohio 1984), *aff'd on other grounds sub nom.* Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); Saro Corp. v. Waterman Broadcasting Corp., 595 So. 2d 87 (Fla. Dist. Ct. App. 1992); Sisler v. Gannett Co., Inc., 516 A.2d 1083 (N.J. 1986); Warford v. The

Courts applying the course-of-conduct analysis, a much looser interpretation of *Gertz*, are more likely to conclude that borderline plaintiffs are public figures. An example is a Third Circuit Court of Appeals ruling that an architect-engineer, E.H. McDowell, who had worked on expensive and controversial public projects was a limited-purpose public figure for discussion of his role in a school project. Long delays and cost overruns accompanied the construction of the school, attracting media attention and two official investigations. Nevertheless, McDowell had not voluntarily sought press coverage. The appeals court said the voluntariness requirement is satisfied when a plaintiff "undertakes a course of conduct that invites attention, even though such attention is neither sought nor desired...." McDowell, the court said, had engaged in such a course of conduct by accepting controversial, publicly financed construction projects.[88] The Wisconsin Court of Appeals applied a similar analysis in a libel suit brought by a farmer, James Wiegel, against the Capital Times Co. The newspaper had published stories and editorials saying Wiegel had contributed to the pollution of a lake adjoining his property by failing to use proper soil conservation practices. Wiegel had not voluntarily sought publicity about his farming practices, nor had he assumed a leadership role in the public debate over these issues. Nevertheless, the Court of Appeals said Wiegel was a public figure because he had played a substantial role in the controversy as the largest landowner of any with land adjoining the lake.[89] The Kansas Supreme

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Lexington Herald-Leader Co., 789 S.W.2d 758 (Ky. 1990).

[88] McDowell v. Paiewonsky, 769 F.2d 942 (3rd Cir. 1985).

[89] Wiegel v. Capital Times Co., 426 N.W.2d 43 (1988). The court claimed its holding was consistent with Waldbaum, but while Waldbaum does not speak explicitly of voluntariness, its description of the plaintiff's role strongly suggests that the plaintiff must have specifically sought to influence the public and to have achieved an especially prominent role in resolving the issue.

Court found that a man accused of three counts of first-degree murder and three counts of aggravated kidnapping was a public figure. The court said criminal suspects may be public figures if the crime of which they are accused becomes a public controversy because it is particularly heinous or the victim is a public figure and if the suspect's role in the controversy is substantial enough to make him a public figure.[90]

Neither the strict analysis of the plaintiff's role in a controversy nor the course-of-conduct analysis is entirely satisfactory. Courts using strict analysis of the public figure question confound power and publicity. They focus on a plaintiff's efforts to attract or avoid public attention. As a result, people of relatively little influence have been held to be public figures by virtue of their purposeful pursuit of publicity. Carol Vitale, a former *Playboy* "playmate," was found to be a public figure for her libel suit against *National Lampoon* because she had voluntarily posed nude for the magazine a number of times and, thus, had invited attention and comment.[91] The emphasis on the plaintiff's voluntary pursuit of publicity ignores the possibility that the plaintiff may influence or seek to influence matters affecting the lives of many in their communities without attracting public notice. By confounding power and publicity, the *Gertz* test gives greater protection from libel suits to journalists who report on vacuous celebrities and less protection to those who write about the distribution and use of power in a community.

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[90] Ruebke v. Globe Communications Corp., 241 Kan. 595 (1987). For other cases applying course-of-conduct analysis, *see* Barry v. Time, Inc., 584 F.Supp. 1110 (N.D. Cal. 1984); Brewer v. Memphis Publishing Co., Inc., 626 F.2d 1238 (5th Cir. 1980); Brueggemeyer v. American Broadcasting Cos., Inc., 684 F.Supp. 452 (N.D. Tex. 1988); Clyburn v. News World Communications, Inc., 903 F.2d 29 (D.C. Cir. 1990); Dombey v. Phoenix Newspapers, Inc., 724 P.2d 562 (Ariz. 1986); Logan v. District of Columbia, 447 F.Supp. 1328 (D.D.C. 1978); McQuoid v. Springfield Newspapers, Inc., 502 F.Supp. 1050 (W.D. Mo. 1980); Mosesian v. McClatchy Newspapers, 285 Cal. Rptr. 430 (Cal. Ct. App. 1991); Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440 (S.D. Ga. 1976); Russo v. Conde Nast Publications, 806 F.Supp. 603 (E.D. La. 1992); Schwartz v. Worrall Publications, Inc., 610 A.2d 425 (N.J. Super. Ct. App. Div. 1992); Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C. Cir. 1968); Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971).

[91] Vitale v. The National Lampoon, Inc., 449 F.Supp. 442 (E.D.Pa. 1978).

Strict analysis also leads to a kind of reverse-bootstrapping by the plaintiffs. *Gertz* and its progeny worried over the possibility that libel defendants could lift themselves by their bootstraps into a more favorable legal position simply by heaping publicity on the plaintiffs and thereby making them public figures. To avoid this, the U.S. Supreme Court in *Hutchinson* seemed to demand evidence that plaintiffs had voluntarily sought public attention and that the controversy surrounding the plaintiffs had existed before the publication of the defamatory statements.[92] Reverse bootstrapping occurs when plaintiffs place themselves in a more favorable legal position by studiously avoiding publicity, even as they pursue controversial activities or influence public affairs. Reverse bootstrapping presents as much a threat to the First Amendment values underlying *Sullivan* as bootstrapping by defendants.

The course-of-conduct approach to the public figure issue is more receptive to the possibility that those who influence public affairs do so without attracting publicity. Therefore, this approach is not as vulnerable as the strict-analysis approach to the reverse-bootstrapping criticism. But while course-of-conduct analysis has generally favored media defendants, it has also distorted the *Gertz* criteria and made them less predictable. If a farmer whose traditional farming practices have become controversial or a person who is suspected of a heinous crime can be considered to have pursued a course of conduct likely to invite public attention, then it becomes almost impossible to predict reliably who is and who is not a public figure. Even seemingly innocuous business or professional practice may become controversial at some time, and persons engaged in those occupations may have no way to predict when their routine conduct might suddenly thrust them into the public eye. Those who lack the power or the intent to influence public affairs may be emotionally unprepared to deal with their predicament. Treating suspects in heinous crimes as public figures is equally problematic. The key word here is *suspect*, for until that person is convicted she or he is entitled to a presumption of innocence. The experience of Richard Jewell, the security guard who became a suspect in the Atlanta Olympic bombing case, should convince all journalists of the dangers that follow from disregarding that presumption.[93]

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[92] *Hutchinson*, 443 U.S. at 135.

While courts have divided over the proper standard for finding plaintiffs voluntarily sought public attention, other courts have held that the public controversy at the heart of the defamation must exist prior to its publication. This aspect of the limited-purpose public figure standard places at greatest risk aggressive investigative reporting. When CBS's *60 Minutes* did a 1976 segment on diet doctors who overprescribe amphetamines, the issue was largely unknown to the public. A doctor who was mentioned in the broadcast sued for libel. One of the contested issues was whether he was a public figure. Since 1951, nearly 50 journal articles and books had been published on amphetamine overprescription, all for academic or medical audiences. The New York court reviewing the doctor's suit against CBS looked at the narrow audience for the publications and concluded that it was a professional dispute and not a public controversy.[94] The

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[93] Alicia C. Shepard, *Going to Extremes*, AM. JOURNALISM REV., Oct. 1996, at 38.

[94] Greenberg v. CBS, Inc., 419 N.Y.S.2d 988 (N.Y. App. Div. 1979).

Kentucky Supreme Court also concluded that an assistant basketball coach at the University of Pittsburgh was not a public figure for discussion of recruiting violations. One basis for that conclusion was the absence of any pre-existing controversy over recruiting practices at Pitt. The national concern over college athletics and recruiting was too general, the court said, to make the plaintiff in this case a public figure.[95] And when the Floyd County, Va., bank sued the company that erroneously reported the bank had nearly exhausted its equity, the federal appeals court said there was no pre-existing controversy over the bank's financial condition.[96]

These and similar cases add a new twist to the public-interest problem the U.S. Supreme Court addressed in *Firestone*. In that decision, the court rejected the claim that Mary Alice Firestone was a public figure simply because of the public interest in her salacious divorce trial. The court ruled, in effect, that information that interests the public is not always information that serves the public interest.[97] Disputes that merely titillate the public, even a large portion of the public, do not rise to the level of public controversies for purposes of libel law. In cases like the diet doctor's, the basketball coach's, or the bank's, lower courts have modified the *Firestone* rule to say that no issue is a public controversy unless the public has taken an interest in it. Yet in each of these cases the dispute is more than private; each affects a number of people. Requiring a pre-existing public controversy is inherently flawed. The importance of an issue to the public depends on the nature of the issue itself and its ability to influence lives, not on the amount of publicity is has received. AIDS would be an important issue even if the media ignored it. Tax policy and changes in the tax law rarely receive exhaustive media coverage, and yet businesses thrive or close, stay or move on the basis of changes in tax laws.[98] To limit the *Sullivan* rule only to those issues already in the headlines would place at great risk those journalists and others with the courage, intelligence and creativity to recognize and expose problems the public has yet to notice.

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[95] Warford v. The Lexington Herald-Leader Co., 789 S.W.2d 758 (Ky. 1990).

[96] *Blue Ridge Bank*, 866 F.2d at 687.

[97] *Time, Inc.*, 424 U.S. at 454.

The limited-purpose public figure criteria as described by the Supreme Court and refined by lower courts suffer from excessively rigid and narrow classifications that conflict with First Amendment values. The criteria place undue emphasis on the voluntary actions of the plaintiff specifically intended to elicit public attention and on the existence of a public controversy prior to the defamatory publication. The extent of the publicity a plaintiff has attracted or tried to attract bears no logical connection to the promotion of informed self-government -- the central purpose of the First Amendment. Those who successfully avoid public attention may exert greater influence on public affairs than those who bask in the media spotlight. And issues that receive little public notice may affect public health, safety, and prosperity more than the issues on which news organizations shower attention.

V. Why Some Method of Identifying Public Figure Plaintiffs Is Necessary

The inherent problems with the public figure criteria tempt one to believe that the best solution would be to abandon the public figure-private figure distinction altogether. Why not say that central question is whether the issue underlying the defamatory publication is one of general or public interest? This approach would require any person defamed in comment on a matter of public or general concern to prove actual malice. Such an approach would be more consistent with the First Amendment goal of protecting speech on crucial public issues, but it falls before one telling criticism: The public-interest standard fails to provide adequate protection for the reputations of private individuals.

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[98] For evidence of how tax policies and business practices can destroy communities and individual careers, see DONALD L. BARLETT AND JAMES B. STEELE, AMERICA: WHO STOLE THE DREAM? (1996).

An example of a libel plaintiff who might be compelled to prove actual malice under a public-interest test but who clearly is a private figure is Ruby Clark. She sued ABC over a 1977 documentary on sex-related businesses in U.S. cities. One segment of the documentary described the problems prostitution had created for women living in a Detroit neighborhood. The documentary said most prostitutes were young African-American women. One of the visuals accompanying the narration showed the plaintiff, a young, attractive, well-dressed African-American woman, walking down the street. Clark was never a prostitute, did not live in the neighborhood, did not know she was being photographed, and never involved herself in any public debate over prostitution or sex-related businesses. Nevertheless, several friends and acquaintances thought the broadcast portrayed her as a prostitute. She was shunned by church members, and two potential employers refused to hire her because they feared she would hurt their businesses.[99]

Although Clark was not a public figure by any criteria, the news report clearly concerned a matter of public interest or general concern. Under a public-interest test, she probably would have had to prove that ABC knew the use of her photograph falsely implied she was a prostitute or strongly suspected it was making such a false implication. Clark probably could not prove that. Probably, the producers either thought Clark illustrated the kind of innocent woman most hurt by prostitution in the neighborhood or they thought the video provided a safe, bland background for the narration.[100] Nevertheless Clark suffered serious damage to her reputation but did nothing to invite such exposure. People like Ruby Clark need some protection, and any libel standard that fails to protect her will enjoy little public support.

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[99] Clark v. American Broadcasting Companies, Inc., 684 F.2d 1208 (6th Cir. 1982).

In cases such as Clark's, there must be some evidence that the plaintiff occupies -- voluntarily or not -- some position that allows that person to influence public affairs or some evidence that the person has tried to influence public affairs -- publicly or not. Only in such instances should the plaintiff be required to prove actual malice.

VI. A New Approach to Identifying Public Figures

Judges have been trying to identify public figures for just 22 years. Social scientists have been working at much the same task for more than twice as long. Over that time, sociologists and political scientists have advanced three major methodologies for identifying community leaders: the positional approach, the reputational approach and the decision-making approach. These approaches may be adapted by courts for use in deciding whether libel plaintiffs are public figures.

The positional approach identifies community leaders on the basis of their positions in government and private businesses. Typically, researchers try to identify those people who occupy controlling positions in major businesses, public officials and heads of important civic organizations.[101] Researchers using the reputational method interview positional leaders to discover the names of prominent community members. Once the researchers compile a list of names, they submit it to a panel of "judges," people who are knowledgeable about local affairs. The "judges" rank the names and those with the highest rankings are considered community leaders.[102] The decision-making technique focuses on overt behavior. Researchers use intensive field studies of and interviews with community leaders to determine who actually participates in making specific decisions. The participants in the decision-making process are identified and interviewed, and their roles are analyzed.[103]

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[100] *Id.* at 1222-23, (Bailey Brown, J., dissenting). Brown argued that the documentary was not capable of a defamatory interpretation largely on the basis that the most probable interpretation of ABC's use of Clark's image was to show an example of the middle-class black women whom the rise of prostitution threatened.

Each of these approaches has its strengths and weaknesses. The positional approach assumes that people who occupy certain positions actually have power and use it. Some highly visible positions may carry no authority. Or even if a person occupies a position of real authority, that person may refrain from using it. While the positional approach may exaggerate the power and influence of some people, it may overlook others more powerful and influential than those it identifies. A respected lawyer, a prominent minister, a community activist all may exercise influence over a community without occupying a position of authority. The reputational method is vulnerable to criticism on the grounds that it confuses reputation and power. People reputed to have power may actually lack it; those who have it may be largely unknown, even to other community leaders.[104] The decision-making approach, however, may overlook those instances where power is used to block a decision or even to block an issue from becoming a matter of public-discussion. Furthermore, it is likely to uncover only public decisions; corporation leaders probably would make their decisions in closed board rooms.[105]

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[101] Robert O. Schulze and Leonard U. Blumberg, *The Determination of Local Power Elites*, 63 AM. J. SOC. 290-96 (1957).

[102] FLOYD HUNTER, COMMUNITY POWER STRUCTURE, 262-71 (1953). *See also*, Charles M. Bonjean, *Community Leadership: A Case Study and Conceptual Refinement*, 68 AM. J. SOC. 672-81 (1963); M. KENT JENNINGS, COMMUNITY INFLUENTIALS: THE ELITES OF ATLANTA, (1964); and PHILIP J. TROUNSTINE AND TERRY CHRISTENSEN, MOVERS AND SHAKERS: THE STUDY OF COMMUNITY POWER, (1982) for examples of other studies using variations of the reputational approach. RITCHIE P. LOWRY, WHO'S RUNNING THIS TOWN? COMMUNITY LEADERSHIP AND SOCIAL CHANGE (1962) is an example of an informal reputational study. G. William Domhoff has applied this approach to the effort of trying to identify a national power elite. Domhoff has written several books along these lines, but see THE HIGHER CIRCLES: THE GOVERNING CLASS IN AMERICA, (1970), for a discussion of his methodology. Reporters, too, have used this technique for uncovering local power structures. *See* STEVE WEINBERG, THE REPORTER'S HANDBOOK 76-78 (3rd ed. 1996).

[103] Nelson W. Polsby, *How to Study Community Power: The Pluralist Alternative*, 22 J. POL. 474-84 (1960).

While each of the three methods has flaws and may produce distorted results, collectively they have been successful in identifying community leaders for various studies. L. Vaughn Blankenship and Robert Presthus, in studies of two New York towns used both decision-making and reputational approaches for identifying leaders. They found considerable, but not complete, overlap between the lists produced by the two methods. Moreover, they found that the community members with the highest reputations for leadership were likely to be involved in two or more community decisions rather than be just single-issue leaders.[106] They also found that each method acted as a check upon the other. The decision-making approach tended to overemphasize the involvement of public officials, who may have been tangentially involved in decisions because of their offices but who played minor roles. The reputational analysis exposed this. The reputational approach, however, did not distinguish those leaders who had high community reputations but who failed to involve themselves in community affairs. This flaw the decision-making approach corrected.[107]

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[104] Raymond Wolfinger, *Reputation and Reality in the Study of "Community Power,"* 25 AM. SOC. REV. 636-44 (1960).

[105] Thomas J. Anton, Power, *Pluralism and Local Politics*, 7 ADMIN. SCI. Q. 425-57 (1963); *see also*, Peter Bachrach and Morton S. Baratz, *Decisions and Nondecisions: An Analytic Framework*, 57 AM. POL. SCI. REV. 632-42 (1963).

[106] L. Vaughn Blankenship, *Community Power and Decision-Making: A Comparative Evaluation of Measurement Techniques*, 43 SOC. FORCES 207-16 (1964).

The differences among the three methodologies may make them appear unpromising as guidance for legal scholars or judges trying to identify a public figure for purposes of a libel suit. There are reasons for believing, however, that they can be adapted to courtroom use. For one thing, all three methodologies agree that it is possible to identify community leaders, and all three have done so to varying degrees in social science studies. More importantly, the task facing a judge in a libel trial is simpler and clearer than that facing a sociologist or political scientist. The judge only wants to know whether a particular plaintiff is a public figure; the social scientist is trying to identify all the major public leaders in a given community. Finally, the fact that some researchers have successfully applied multiple techniques for uncovering power structures suggests that courts may be able to fashion a multi-element test that would guide the inquiry as to whether a plaintiff is a public figure for purposes of a libel suit.

With these thoughts in mind it is possible to construct a new test for public figures, one that better protects discussion of public issues. With this proposed test, as with the current one, the burden of proving whether a plaintiff is a public figure rests with the defendant.[108] The decision as to whether the plaintiff is a public figure rests with the judge, not the jury.[109] Courts should begin by determining that any defamatory statements deal with matters of general or public interest. If the defamatory statement did not involve a matter of public or general interest, the plaintiff would not have to prove that it was made with actual malice, no matter whether that plaintiff would be a public figure. This resembles the public-controversy element of the *Gertz* test, but courts should take a broad view as to what is a matter of public interest. It should not be limited to politics or governmental affairs but should extend into all matters likely to affect public health, safety, prosperity or happiness. Nor should it be limited to matters that have already attracted media attention. An issue may be one of general or public interest, even though not a word about it has appeared in the mass media. To some extent, this represents a return to the *Rosenbloom* approach, but as noted earlier, a crabbed version of that approach was always implicit in the *Gertz* criteria for limited-purpose public figures.[110]

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[107] ROBERT PRESTHUS, MEN AT THE TOP: A STUDY IN COMMUNITY POWER (1964).

Once the court is satisfied that the defamatory statements deal with matters of general or public interest, then it must decide whether the plaintiff is a public figure. This new test would recognize only one category of public figure; it would not distinguish between general-purpose and limited-purpose public figures. In deciding the issue, the court should ask three questions:

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[108] Lerman v. Flynt Distributing Co., 745 F.2d 123 (2nd Cir. 1984).

[109] Rosenblatt v. Baer, 383 U.S. 75, 88 (1966), and Wolston v. Reader's Digest Ass'n, 578 F.2d 427, 429 (D.C. Cir. 1978).

[110] *Supra* note 45 and accompanying text.

1. Does the plaintiff occupy a position in the community's social, political, or economic life that would allow him or her to exercise appreciably more influence over matters of general or public interest than could ordinary citizens? Every voter influences political affairs to the extent he or she votes; but one would expect a local party leader to exercise much greater influence over the political life of the community than the voter. The pastors of major churches in a community, the administrators of local hospitals and the top executives of a community's leading businesses are examples of people who would fit this criterion.[111] It might also apply to those who lead businesses in which there is an usually high degree of public interest, for instance, businesses that are heavily regulated. By this reasoning, Wayne Newton would have been a public figure for purposes of his libel suit against NBC, not because of his fame as a performer, but because of his financial involvement in the heavily regulated business of casino gambling.[112]

2. Does the plaintiff have a reputation within the community as one who possesses a degree of influence over matters of general or public interest appreciably greater than that of the ordinary citizen? A person who has a reputation as a major player in a particular public issue or in several such issues may be a public figure even though that person has avoided the spotlight. Evidence of the plaintiff's reputation for influence may come from surveys or direct testimony of witnesses who are themselves considered leaders. A person's prior media exposure may also be relevant, but one need not own a scrapbook thick with press clippings to become a public figure.

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[111] Political leaders, such as mayors or police chiefs, would have to prove actual malice in libel cases as a result of their status as public officials.

[112] Newton v. NBC, *supra* note 58.

3. Has the plaintiff participated in or tried to influence, to a degree greater than that of the ordinary citizen, the decision-making process on any matter of general or public interest? The plaintiff's participation or efforts to influence may or may not be public. The plaintiff would be a public figure regardless of whether he or she sought or avoided publicity. For example, a person who has or appears to have substantial resources for influencing a public body in regard to any public issue would become a public figure. Even if, as in the case of Charlotte White,[113] the woman who worked as an organizer of Native American pow-wows, the effort to influence a public decision consisted of only one appearance before a city council, that would be enough to make the plaintiff a public figure if the evidence showed that the plaintiff was able to exert more influence that could the ordinary citizen.[114]

If the court could answer yes to any of the three questions, then the plaintiff would be a public figure for the purpose of discussing his or her involvement in the matter of general or public interest raised in the defamatory statement.

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[113] *Supra* note 85 and accompanying text.

[114] A comparison of White's case with that of W. Bedford Moore III helps illustrate where the line may be drawn. [Fleming v. Moore, 275 S.E.2d 632 (Va. 1981)]. Moore, an assistant professor at the University of Virginia, had made two brief statements at public meetings opposing a plan to build a housing project on land adjoining his in Albermarle County. The developer, an African-American, later placed an advertisement in two newspapers accusing the opponents of his plan of racism. The advertisements mentioned Moore, a white man, by name. The Virginia Supreme Court, reviewing this case, concluded that Moore had not become a limited-purpose public figure simply by speaking publicly on two occasions. He never went to the media and did not try to organize opposition to the project. Moore simply wanted to defend the value of his property and could offer the officials making the decision no incentive to decide the issue in his favor. Unlike Moore, White was promoting an event, and people in such positions typically use promises of increased tourism, revenues for local business and higher tax receipts to influence government decisions. Also, she was asking the city to invest tax money in her project, although she promised to repay the city.

VII. Application of the Proposed Standard to Corporations and Businesses

The discussion of public figures so far has focused largely on individuals. Corporations and businesses may sue for defamation and may be public figures. How easily they may become public figures is a matter of controversy. One early case suggested that the *Gertz* rationales for offering more protection from defamation to private individuals did not apply with equal force to corporations, which possess no private lives. Therefore, corporate plaintiffs in defamation cases should have to prove actual malice in any case involving a matter of public interest.[115] At the other extreme is a California Supreme Court decision in a libel case brought by a company that closes out stores that have failed or are going out of business. The defendant argued that because the company advertised it had thrust itself to the forefront of a controversy. The California high court responded that criticism of commercial conduct deserves no special First Amendment protection. Thus a libel plaintiff does not become a public figure just because it has engaged in commercial advertising.[116]

Most courts have attempted to apply to corporate and business plaintiffs the same *Gertz* criteria used for people. The success has been mixed. In one case, a transmission repair business accused of recommending unnecessary work and charging for work that was never done was held to be a private figure. The court reasoned that the business had not sought public attention but had been dragged into the limelight by the television station that reported on its conduct.[117] In a similar case, the Supreme Court of New Jersey held that a lawn mower repair business accused of performing unnecessary work and charging for work never done was a public figure. The court had already held that businesses that were heavily regulated or that whose activities implicated important public interests, such as health, were public figures. In this case, the court concluded that ordinary businesses accused of conduct that, if true, would support a consumer fraud complaint must also prove actual malice.[118]

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[115] Martin Marietta Corp. v. The Evening Star Newspaper Co., 417 F.Supp. 947 (D.D.C. 1976).

[116] Vegod Corp. v. ABC, 5 Media L. Rptr. 2043 (Cal. 1979).

The public-figure test suggested in this paper should apply as well to corporations and businesses as to people. Some businesses or corporations may occupy positions of power and influence much greater than that of ordinary businesses. For example, monopoly businesses often occupy such positions, either natural monopolies, such as newspapers, or government-created monopolies, such as electric power companies or cable television franchises. Other businesses and corporations may have reputations for exerting influence over matters of general or public interest. A particular real estate broker, for instance, may have a reputation for influencing patterns of community growth and development. And many businesses and corporations may devote substantial resources to swaying decisions on matters of public concern. This may be as public and pervasive as the efforts of tobacco companies to influence public opinion on smoking and health or it may be as quiet as the efforts of an insurance agent to retain a local government as a client. In all cases, however, a business or corporation would have to prove actual malice only in defamation cases involving matters of general or public interest. Routine legal business practices, such as sales techniques or personnel policies, would not satisfy the public-interest standard, but any practices that implicated public health or welfare would satisfy it.

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[117] Saro Corp. v. Waterman Broadcasting Corp., 595 So.2d 87, (Fla. Dist. Ct. App. 1992). *See also* Bruno & Stillman, Inc., v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) and Bank of Oregon v. Independent News, Inc., 693 P.2d 35 (Ore. 1985).

[118] Turf Lawnmower Repair, Inc., v. Bergen Record Corp., 655 A.2d 417 (N.J. 1995). *See also* Quantum Electronics Corp. v. Consumers Union, 881 F.Supp. 753 (D.R.I. 1995).

In one way, businesses and corporations may be more likely to be considered public figures than would individuals. Businesses advertise. It is reasonable to presume, as the U.S. Supreme Court did in the *Central Hudson* case, that businesses advertise in order to influence consumer conduct.[119] Whenever a business advertises in connection with a matter of general or public interest, as when the product has implications for public health or safety, then it would satisfy the third criterion of the proposed public-figure test.

VIII. Implementing the New Public-Figure Test

The most direct route to implementing the definition of public figure proposed here is to have it adopted by the U.S. Supreme Court. This would require the justices, several of whom have written or concurred in opinions embracing the *Gertz* criteria, to change their minds. Even if they were willing to do so, they might not find a suitable case for deciding the issue until several years had passed. Given these difficulties, a state-by-state approach to adoption of the public-figure definition presented here might produce results more quickly, as long as the states are free to experiment in this area.

If the *Gertz* criteria for deciding who is a public figure are constitutionally required, then the consideration of alternative criteria would be nothing more than an intellectual exercise. A careful reading of the Supreme Court opinions suggests that the Constitution does not require these criteria. According to the court, the Constitution requires that public officials and public figures prove actual malice in order to recover damages for defamation.[120] The Constitution also requires that even private individuals must prove some degree of fault in order to recover damages.[121] In the absence of any explicit statement to the contrary, one may conclude state are free to adopt their own definitions of public figures.

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[119] Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 569 (1980).

States might modify the public-figure standard in either of two ways: One is to persuade state courts to adopt different criteria for deciding who is a public figure. A defendant in a libel case that presents the appropriate set of facts may persuade a state appellate court to adopt a different approach to identifying public figures. The other possibility is to persuade state legislatures to define public figures statutorily for libel purposes in the manner outlined in this paper. Neither approach would produce quick results, but they have the virtue of not depending on the willingness of the U.S. Supreme Court to accept an appropriate case or to reconsider *Gertz*.

IX. Conclusions

Many of the court decisions as to who is a public figure would be unchanged by the criteria proposed here. The leaders of the Peace Park protests in Berkeley, Calif., would still be public figures, and so would Alabama politician James Faulkner. Ruby Clark and Lee Dresbach, on the other hand, would remain private figures. In a few important cases, however, the status of the plaintiff would change from private to public or vice versa. R.D. Hicks, the local "Boss Hogg" of Stevenson, Ala., would become a public figure because of his admitted reputation as an influential figure in his community. The Blue Ridge Bank also would become a public figure, because as one of only two banks in Floyd County, Va., it would possess a degree of influence over the economic life of the community substantially greater than that of most individuals or other businesses. On the other hand, people who were celebrities and nothing more might become private figures. Robyn Douglass, Carol Vitale and Orlando Cepeda hold no positions of authority, do not have reputations for influencing matters of general or public interest, and have not participated in or tried to influence decisions on matters of general or public interest. Moreover, the issues that gave rise to the statements that injured them -- the unauthorized publication of some photographs, an unflattering parody and a contract dispute -- were not matters of general or public interest.

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[120] *New York Times*, 376 U.S. at 279, and *Gertz*, 418 U.S. at 343.

[121] *Gertz*, 418 U.S. at 347.

The standard proposed in this paper has the potential to place one of the crucial issues in modern libel law on a basis more consistent with the First Amendment. What news readers and viewers think of as the public sphere -- the issues, events and conduct legitimately open to public investigation and comment -- is shaped in part by who is considered a public figure. If the realm of public figures consists primarily of movie stars, sports heroes and the idle rich, then people will see the public sphere as embracing entertainment, sports, fashion and little else. A public living under such a regime may not learn of decisions and events that affect their families, careers and communities. If, however, the category of public figures includes those leaders in private businesses and associations who exercise real control over wealth and power, then the public sphere becomes much larger, embracing a wide range of issues and decisions by private as well as public entities. The criteria for identifying public figures recommended in this paper explicitly recognize that the purpose of the *Sullivan* rule is to protect discussion about public issues broadly conceived, not to protect gossip about movie stars. And while this standard requires only public figures to prove actual malice, it would define public figures in terms that relate more realistically to the role of the press in uncovering and examining public issues.

The Constitutionality of the FDA's Tobacco Restrictions as a First Amendment Issue

by

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The Constitutionality of the FDA's Tobacco Restrictions as a First Amendment Issue

Abstract

This article analyzes the constitutionality of the FDA's tobacco rule by applying Central Hudson test. It discusses the history of tobacco advertising regulation and evolution of commercial speech protection. The availability of alternatives is found to be a crucial indicator of the fit between the FDA's ends and means. Regulation incorporating all four marketing factors is suggested as an alternative approach to achieve the goal of the FDA rule while upholding First Amendment principles.

In August 23, 1996, President Clinton announced the nation's first comprehensive program to prevent children and adolescents from smoking cigarettes or using smokeless tobacco and beginning a lifetime of nicotine addiction. The announcement was based on the proposal for tobacco restriction which was prepared by the Food and Drug Administration (FDA) a year ago.

The FDA rule aims to reduce children's easy access to tobacco products by: Requiring age verification by photo ID for anyone under the age of 27 purchasing tobacco products; banning vending machines and self-service displays except in "adult" facilities where children are not allowed, such as certain nightclubs totally inaccessible to anyone under 18; and banning free samples, the sale of single cigarettes, and packages containing fewer than 20 cigarettes.[1]

The FDA rule limits the appeal of tobacco products to children by: Prohibiting billboards within 1,000 feet of schools and playgrounds. Other advertising is restricted to black-and-white text only; this includes all billboards, signs inside and outside of buses, and all advertising in stores. Advertising inside "adult only" facilities like nightclubs can have color and imagery; Permitting black-and-white text-only advertising in publications with significant youth readership (more than 15 percent or more than 2 million readers under 18) and there are no restrictions on print advertising below these thresholds; prohibiting sales or giveaways of products like caps or gym bags that carry cigarette or smokeless tobacco product brand names or logos; prohibiting brand-name sponsorship of sporting or entertainment events (including teams and entries), but permitting it in the corporate name.[2]

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[1] Jim O'Hara, *President Clinton Announces Historic Steps to Reduce Children's Use of Tobacco* (released Aug. 23, 1996) <http://www.os.dhhs.gov/news/press/1996pres/960823a.html>.

Advertising and media groups criticize the broad scope of the rules; the FDA's assumption that advertising causes children to start smoking and that reducing advertising would affect underage smoking; and the agency's willingness to unveil the restrictions despite a recent U.S. Supreme Court case, *44 Liquormart, Inc. v. Rhode Island*,[3] that appeared to give broad First Amendment protection to advertising. They are also concerned over the enormous impact of the rules on their business such as loss of jobs, loss of business opportunity, and loss of creative freedom.[4]

While the controversy over the rule continues, the purpose of this article is to examine the constitutionality of the FDA tobacco rule as a First Amendment issue. The study begins with a brief overview of the regulatory history of tobacco advertising. Next, the evolution of commercial speech protection will be investigated in terms of major commercial speech cases, including recent court decisions in *44 Liquormart, Inc. v. Rhode Island*, and *Rubin v. Coors Brewing Co.*[5] The availability of alternatives is found as an important criterion in deciding whether the fit between the government's interest and imposed measures is reasonable. The finding is reflected in analyzing the FDA rule by *Central Hudson*'s four prong test. Later, the alternatives are discussed, in detail, with regard to four marketing factors. Finally, the paper concludes that the FDA rule unreasonably sacrifices First Amendment principles by trying to reduce underage smoking mostly through advertising restrictions while other alternatives are available, which may be more effective and less intrusive to the freedom of speech.

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[2] *Id.*

[3] 116 S.Ct. 1495 (1996).

[4] Ira Teinowitz, "Historic Attack on Cig Marketing, Tough Regs for Tobacco" *Advertising Age*, (August 26, 1996).

[5] 115 S.Ct. 1585 (1995).

History of the tobacco advertising regulation

Since the Surgeon General's report in 1964,[6] the government tried to protect the public's physical well-being by regulating information about the product rather than the product itself. For example, the government has never imposed specification standards regarding the design of safe cigarettes such as filters or particular cigarette designs. The emphasis of the cigarette risk-regulation efforts instead has been on decreasing smoking activity by altering behavior and providing information about the smoking risk.[7]

On January 11, 1964, the advisory committee on Smoking and Health released the Surgeon General's Report, which contains two major conclusions:

> Cigarette smoking is a health hazard of sufficient importance in the United States to warrant remedial action.
>
> Cigarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs other factors. The data for women, although less extensive, point in the same direction.[8]

In the summer of the same year, the FTC issued a ruling requiring all cigarette advertising and packages to display a health warning notice. When Congress completed hearings a year later, it designed and enacted the Cigarette Labeling and Advertising Act. The act required a health warning to be printed on cigarette packages and included a provision which for three years prevented any federal, state, or local authority from requiring that cigarette advertising include a statement relating to smoking and health.[9]

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[6] U.S. Department of Health, Education, and Welfare, "Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service," Public Health Publication No. 1103 (Washington, D.C.: U.S. Government Printing Office, 1964).

[7] W. Kip Viscusi, *Smoking: Making the Risky Decision* (New York: Oxford University Press, Inc., 1992).

[8] U.S. Department of Health, Education, and Welfare, *supra* note 6, at 31-33.

In 1967, a combined effort on the part of attorney John F. Banzhaf III and the FCC resulted in use of a regulation of unprecedented scope in the realm of government intervention in the activities of this industry, the Fairness Doctrine. Based on an amendment of Section 315 (the Equal Opportunity Rule) of the Communication Act, the Fairness Doctrine required broadcasters to provide adequate time for the discussion of controversial public issues. Also, the broadcasters had to insure that the coverage of these issues included a representation of all significant viewpoints on these issues.[10] Applying the doctrine to commercial announcements, Banzhaf asked WCBS-TV to provide free time in which anti-smokers might respond to the pro-smoking views he said were implicit in the cigarette commercials in broadcast. Though broadcasters argued that the doctrine deprived them of First Amendment rights, the U.S. Supreme Court held that the Cigarette Labeling Act of 1965 does not constitute congressional preemption of the field of regulation addressed to health problems posed by cigarette smoking and does not deny the FCC the authority to require radio and television stations which carry cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking.[11] The Court also held that the Act did not violate the First Amendment because it does not ban any speech and even if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss.[12]

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[9] Gideon Doron, *The Smoking Paradox* (Cambridge, Massachusetts: 1979).

[10] Don R. Pember, Mass Media Law (Dubuque, IA: WCB, Brown & Benchmark, 1993) at 588.

[11] Banzhaf v. F.C.C., 405 F.2d 1082 (1968).

[12] *Id.*

In 1970, President Nixon signed the Public Health Cigarette Smoking Act of 1969. The act prohibited the advertising of cigarettes on broadcast media after January 1, 1971.[13] Though the ban was hailed by the antismoking forces as a major victory, there was one serious drawback. Since the broadcasters could no longer advertise cigarettes, they were no longer required to comply with the Fairness Doctrine. Consequently, the influence of the controversy on the public was dampened, and cigarette consumption rose significantly as the frequency of antismoking spots was reduced.

The evolution of First Amendment protection for commercial speech

Previous status of commercial speech

In *Valentine v. Chrestensen*,[14] the U.S. Supreme Court first declared that the Constitution placed no restraints upon government regulation of commercial advertising. The rule that commercial speech had no first amendment protection began to erode when the Court invalidated a Virginia statute that criminalized the sale or circulation of any publication that encouraged procurement of an abortion.[15] The Court stated that the government cannot restrict advertising where the commercial activity itself is legal,[16] and held that it was error to assume that commercial speech was entitled to no First Amendment protection or that it was without value in the marketplace of ideas.[17]

Expansion of the commercial speech protection

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[13] Gideon Doron, *supra* note 9, at 17.

[14] 316 U.S. 52 (1942).

[15] Bigelow v. Virginia, 421 U.S. 809 (1975).

[16] *Id.*

[17] *Id.*, at 825-826.

The holding in *Bigelow* was expanded in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[18] Here, the Court held that the State's blanket ban on advertising the price of prescription drugs violated the First Amendment.[19] *Virginia Pharmacy Bd.* reflected the conclusion that the same interest that supports regulation of potentially misleading advertising, namely the public's interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages. The Court explained: "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price....It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."[20]

Central Hudson Test

Five years after *Bigelow*, a four-part analysis for commercial speech cases was crafted in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[21] The New York Public Service Commission had ordered the state electric utilities not to promote the use of electricity because of a concern that demand would exceed supply. In 1977, the Commission continued its ban but allowed institutional and informational advertising. The Court concluded that the Commission had failed to show that a more limited speech regulation would be ineffective and therefore overturned the advertising ban.[22]

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[18] 425 U.S. 748 (1976).
[19] *Id.*
[20] *Id.* at 765.
[21] 447 U.S. 557 (1980).

As articulated in this opinion, the Court in commercial speech cases would proceed through the following steps:[23] (1) Determine whether the expression is protected by the First Amendment, that is, does it involve lawful activity and not mislead the audience? (2) Does the government have a substantial interest to be achieved by restricting the speech? (3) Does the regulation directly advance the government's interest? (4) Is the regulation more extensive than necessary to achieve that interest?

Central Hudson amounted to a significant move in the direction of regulating commercial speech, including truthful statements. The fourth step of *Central Hudson* has become the focal point of debates in later cases. The Court's claim that this four-part test had evolved from previous commercial speech cases was not documented. Justice Blackmun, in a dissenting opinion, argued that this test allowed the Commission to manipulate the economic choices of consumers by curbing their access to information.[24]

The Central Hudson case represents a redirection in terms of deciding what degree of protection to accord commercial statements. Central Hudson amplified the Court's examination of commercial speech to include a matter or activity in question. The Central Hudson Court therefore withdrew some of the protection bestowed upon commercial speech during the previous five years.[25]

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[22] *Id.* at 571.

[23] *Id.* at 566.

[24] David F. McGowan, "A Critical Analysis of Commercial Speech," *California Law Review*, 78: 359-448 (1990).

[25] Karl A. Boedecker, Fred W. Morgan, & Linda Berns Wright, "The Evolution of First Amendment Protection for Commercial Speech," *Journal of Marketing* 59: 38-47 (1995).

Weakening protection for the speech

The Court in 1986 greatly expanded governmental powers to control promotional activity in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico.*[26] The Puerto Rican legislature had legalized casino gambling but prohibited the casinos from promoting their facilities to Puerto Rican citizens. The Tourism Company, established by the legislature, administered the gambling industry. That agency prohibited casino franchise holders from using the word casino on any items accessible to people living in Puerto Rico. Posadas, a casino holding company, was fined for violating these regulations and subsequently challenged them.[27]

Reacting to Posadas' objection, the Puerto Rico Supreme Court rewrote the regulations to try to resolve the first amendment problems. The revised standards relaxed some of the regulatory agency's restrictions, but nonetheless allowed use of the word casino only where the trade name of the hotel was used. The standards also required previous approval of the Tourism Company for advertising and publicity addressed to tourists within Puerto Rico.[28]

The U.S. Supreme Court declared that advertising of casino gambling could be forestalled because casino gambling itself could be banned.[29] So where the underlying commercial endeavor could be outlawed, the government can forbid promotional activities regarding the endeavor. Thus, *Posadas* substantially reduced First Amendment support for commercial communications by upholding government authority for both previous restraint and censorship of truthful advertising for a legal service.

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[26] 478 U.S. 328 (1986).

[27] *Id.*

[28] *Id.*

Trend in the current cases

In *Rubin v. Coors Brewing Co.*,[30] the Court extented commercial speech protection to labels on alcoholic beverages but left the doctrine as unclear as before. The Court applied the four-prong test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[31] and held that a federal ban on disclosure of the alcohol content of beer on labels was overbroad and failed to advance directly the government's interest in preventing strength wars between brewers. In a unanimous opinion, the Supreme Court affirmed. Justice Thomas, writing for the Court, found that, although the Government's interest was substantial, the federal ban failed the Central Hudson test because it lacked a reasonable fit with the interest. Justice Thomas stated that the ban is more extensive than necessary, since available alternatives to the labeling ban—including directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength, and limiting the ban to malt liquors (the segment of the beer market that allegedly is threatened with a strength war)—would prove less intrusive to the First Amendment's protections for commercial speech.[32]

The Court reaffirmed the commercial speech protection in *44 Liquormart, Inc. v. Rhode Island*[33] in 1996. Liquor retailers brought a declaratory judgment action challenging Rhode Island statutes prohibiting advertisement of liquor prices. The United States District Court for the District of Rhode Island held the statutes were invalid. The Court of Appeals for the First Circuit reversed. The Supreme Court held that state's

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[29] *Id.* at 346.
[30] 115 S.Ct. 1585 (1995).
[31] 447 U.S. 557 (1980).
[32] 115 S.Ct. at 1587.
[33] 116 S.Ct. 1495 (1996).

complete statutory ban on price advertising for alcoholic beverages abridged speech in violation of the First Amendment.[34]

The reasoning in *Posadas* was not supported in *44 Liquormart*. The Court interpreted the *Posadas*' "greater-includes-the-lesser" argument as an erroneously performed First Amendment analysis. In Posadas, the majority stated that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[35] Contrary to the assumption made in Posadas, the Court in 44 Liquormart thought that banning speech may sometimes prove far more intrusive than banning conduct. "…it may prove more injurious to prevent people from teaching others how to fish than to prevent fish from being sold. Similarly, a local ordinance banning bicycle lessons may curtail freedom far more than one that prohibits bicycle riding within city limits."[36] Under the reasoning, the Court rejected the assumption that words are necessarily less vital to freedom than actions (or the logic that the power to prohibit an activity is necessarily greater than the power to suppress speech about it).[37] As a result, it was concluded that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends because the First Amendment directs that government may not suppress speech as easily as it may suppress conduct.

Under the assumption that the prohibition satisfies the test's first three prongs,[38] the Court decided that Rhode Island's regulation failed the final fourth prong because its ban is more extensive than necessary to serve its stated interest. Rhode Island justified its ban on price advertising on the grounds that the ban is intended to keep alcohol prices high as a way to keep consumption low. In order for a speech restriction to pass the fourth prong test, there must be a reasonable fit between the legislature's goal and method. "The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny."[39] The fit in 44 Liquormart was found to be not reasonable, since the State has other methods at its disposal—e.g., establishing minimum prices and /or increasing sales taxes on alcoholic beverages—that would more directly accomplish its stated goal without intruding on a seller's ability to provide truthful, nonmisleading information to customers.[40]

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[34] *Id.*
[35] 478 U.S. at 345-346.
[36] 116 S.Ct. at 1512.
[37] *Id.*

In both cases, the availability of alternatives, which are less intrusive to freedom of speech, was the most important factor in the final fourth prong test.

Analysis of the FDA Rule

In commercial speech cases, *Central Hudson*'s four-part analysis has been adopted as a standard to determine the acceptability of laws restricting commercial speech under the First Amendment. For the constitutionality of the FDA rule, the following requirements should be satisfied. First, tobacco advertising concerns lawful activity and not misleading. Second, the government interest to prevent underage smoking is substantial to restrict the speech. Third, the FDA rule directly advance the governmental interest. Fourth, and finally, the rule is no more extensive than necessary to serve the

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[38] 116 S.Ct. 1495 at 1500. (1) the speech at issue concerns lawful activity and is not misleading, (2) the asserted governmental interest is substantial, and (3) the regulation directly advances the governmental interest.

[39] *Id.* at 1521.

[40] *Id.*

government interest. In other words, that there are no less restrictive alternatives to prevent underage smoking than speech restriction.

Does the speech concern lawful activity and not mislead?

The determinant of whether the expression falls within First Amendment protection is that the speech "must concern lawful activity and not be misleading."[41] While there is no doubt that cigarette smoking is a legal act, the appealing imagery of tobacco advertisements has been the main target of anti-tobacco groups.

Depicting vigorous people in pristine outdoor environments or cigarette brand names in promotional association with sporting events, cigarette advertisements typically feature veritable pictures of health.[42] The imaged themes of cigarette advertisements (e.g., independence, adventure seeking, social approval, success and sophistication, healthfulness) are known to appeal to young people. The theme of independence, so captured by the Marlboro Man or Virginia Slims, is particularly resonant with the characteristic need of adolescents for autonomy and freedom from authority. Moreover, some of the models in cigarette advertisements appear particularly youthful.[43]

Thus, the first argument on behalf of the tobacco advertising restriction is that cigarette advertising is misleading by its own nature. However, deception is usually thought of in terms of statements.[44] Advertising for an oven that says it is self-cleaning, when in fact it is not, is a clear example of deception. A cigarette company ad that says that smoking has not been proven dangerous, if it is found to be commercial speech at all, can be banned as deceptive. But what about an ad that says no more than "Alive with pleasure" or "The experience you seek?" What about the Marlboro Man with the chaps and spurs who is the strong silent type? He doesn't say anything at all, let alone anything deceptive.[45] Furthermore, the existence of health warnings may not make the advertising misleading.

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[41] Central Hudson, 447 U.S. at 566.

[42] Richard W. Pollay, "Signs and Symbols in Cigarette Advertising: A Historical Analysis of the Use of Pictures of Health," in *Marketing & Semiotics*, Hanne Hartvig-Larsen, David G. Mick, & Christian Alsted, eds. (Copenhagen: Handelshojskolens Forlag. 1991), 160-176.
Richard W. Pollay, "The Changing Character of American Cigarette Advertising: Content Analysis Findings," *World Marketing Congress* 6: 297-301 (1993).
U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People. A Report of the Surgeon General.* (Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Office on Smoking and Health 1994), 179-184.

[43] Michael Mazis, Debra J. Ringold, Elgin S. Perry & Daniel W. Denman, "Perceived Age and Attractiveness of Models in Cigarette Advertisements," *Journal of Marketing* 56: 22-37 (1992).

In the case of alcoholic products, a flood of beer advertisements has appeared appealing primarily to youth, and linking beer to sports and sexual interests; and international comparisons show that alcoholism can occur just as readily in predominantly beer- and wine-drinking as in spirit-drinking countries.[46] However, courts have rejected as "highly paternalistic" the view that alcohol ads are inherently misleading because they convey emotive, noninformational images that tie alcohol consumption to the "good life."[47] Therefore, because the product is legal and the advertising is arguably not misleading, the first prong of the *Central Hudson* test has been met.

Does the government have a substantial interest to be achieved by restricting the speech?

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[44] Larry C. White, *Merchants of Death* (New York: Beech Tree Books, William Morrow and Co., Inc., 1988) at 158.
[45] *Id.* at 158-159.
[46] Avram Goldstein & Harold Kalant, "Drug Policy: Striking the Right Balance," *Science* 249: 1513-1521 (1990).
[47] Oklahoma Telecasters Association v. Crisp, 699 F.2d 490 (10th Cir. 1985); Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983).

Under the Central Hudson formulation, the Court next asks "whether the asserted governmental interest is substantial."[48] Articulation of the specific government interest is important in order to justify the need for regulation, and also plays a crucial role in determining whether the regulation directly advances, and is narrowly tailored toward, an important end.

Then, why is the government so eager to prevent adolescents' smoking? A fundamental concern over smoking youths has long been addressed through research. For example, it is estimated that approximately one billion packs of cigarettes worth more than $1 billion are consumed annually in the United States by minors less than 18 years of age.[49] The younger the age of sampling and uptake (i.e., regular smoking onset), the greater the likelihood of chronic use as adults.[50] According to the World Health Organization, half (200 million to 300 million) of children and adolescents under 20 (world-wide) will be killed by tobacco if they continue smoking throughout their lives.[51] Furthermore, recent data show a statistically significant increase of 1.8 percent in high school seniors daily smoking from 1992 to 1993.[52]

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[48] Central Hudson, 447 U.S. at 566.

[49] Joseph R. DiFranza & Joe B. Tye, "Who Profits from Tobacco Sales to Minors?" *Journal of the American Medical Association* 263: 2784-2787 (1990).

[50] Laurie Chassin, Clark C. Presson, Steven J. Sherman, Eric Corty, & Richard W. Olshavsky, "Predicting the Onset of Cigarette Smoking in Adolescents: A Longitudinal Study," *Journal of Applied Social Psychology* 14: 224-243 (1984).
Laurie Chassin, Clark C. Presson, Steven J. Sherman, & Debra A. Edwards, "The National History of Cigarette Smoking: Predicting Young-Adult Smoking Outcomes from Adolescent Smoking Patterns," *Health Psychology* 9: 701-716 (1990).

[51] Rebecca Voelker, "Young People May Face Huge Tobacco Toll," *Journal of the American Medical Association* 274: 203 (1995).

[52] L. Johnston, P. O'Malley, & J. Bachman, "Monitoring the Future Study" Press release, University of Michigan, Ann Arbor, MI, January 31, 1994.

Therefore, the purpose of the FDA rule, to "reduce the access of tobacco products to young people under 18 years of age," clearly establishes a substantial government interest.

Does the regulation directly advance the governmental interest?

In determining the constitutionality of the fit between the means of the FDA's rule and the goal of reducing underage smoking, a court must first determine whether the regulations directly advance the state interest.[53] Does the FDA rule advance the asserted government interest? That depends on whether the enforcement of the rule would actually reduce the prevalence of smoking among young people under 18 years of age.

Most debates have been concerned with the effects of tobacco advertising. Various research methods have been used to study whether cigarette advertising actually induces children and adolescents to smoke. According to the result of content analyses, about 17% of the models in cigarette ads seemed to be under 25 years old and those younger models appeared more frequently in magazines with significant teenage audiences.[54] Pollay concluded, based on his research, that certain advertisers researched and then targeted specific segments of underage smokers.[55] However, none of these findings demonstrate that cigarette advertising actually induces youths to start smoking because the content analysis method can not address any causal relationship between variables.

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[53] Central Hudson, 447 U.S. at 564.

[54] Michael B. Mazis, Debra Jones Ringold, Elgin S. Perry, & Daniel W. Denman, "Perceived Age and Attractiveness of Models in Cigarette Advertisements," *Journal of Marketing* 56: 22-37 (1992).

[55] Richard W. Pollay, & Anne M. Lavack, "The Targeting of Youths by Cigarette Marketers: Archival Evidence on Trial." In *Advances in Consumer Research* 20, ed. Leigh McAllister and Michael Rothschild (Provo, Utah: Association for Consumer Research, 1993).

Recent surveys have examined R. J. Reynolds' Camel cigarette campaign because the ads feature Old Joe Camel, a cartoon character that may have particular appeal to youngsters.[56] Surveys show that 90% of school-age children recognize that Old Joe promotes cigarettes,[57] a higher recognition rate than that among adults.[58] Further, 43% of the youths surveyed thought Old Joe was "cool," and 35% liked Old Joe as a friend.[59] However, it is still not clear whether these responses may simply reflect favorable attitudes toward the cartoon character or toward smoking.

Several researches have demonstrated a positive correlation between cigarette advertising exposure and adolescents' intentions to smoke and actual smoking behaviors. For example, Aitken found that the number of cigarette ads correctly identified was positively associated with cigarette usage and intended usage both initially and after a one-year period.[60] However, there is an argument that the high correlation between advertising awareness and smoking intentions and behaviors might simply indicate that youths who have already decided to smoke pay more attention to cigarette ads.[61] Even the

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[56] *See, e.g.*, Paul M. Fischer, Meyer P. Schwartz, John W. Richards, Jr., Adam O. Goldstein, & Tina H. Rojas, "Brand Logo Recognition by Children Aged 3 to 6 Years," *Journal of the American Medical Association* 11: 3145-3146 (1991); Joseph R. DiFranza, John W. Richards, Jr., Paul M. Paulman, Nancy Wolf-Gillespie, Christopher Fletcher, Robert D. Jaffe, & David Murray, "RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children," *Journal of the American Medical Association* 11: 3149-3153 (1991); John P. Pierce, Elizabeth Gilpin, David M. Burns, Elizabeth Whalen, Bradley Rosbrook, Donald Shopland, & Michael Johnson, "Does Tobacco Advertising Target Young People to Start Smoking?" *Journal of the American Medical Association* 11: 3154-3158 (1991).

[57] Paul M. Fischer, Meyer P. Schwartz, John W. Richards, Jr., Adam O. Goldstein, & Tina H. Rojas, "Brand Logo Recognition by Children Aged 3 to 6 Years," *Journal of the American Medical Association* 11: 3145-3146 (1991).

[58] Joseph R. DiFranza, John W. Richards, Jr., Paul M. Paulman, Nancy Wolf-Gillespie, Christopher Fletcher, Robert D. Jaffe, & David Murray, "RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children," *Journal of the American Medical Association* 11: 3149-3153 (1991).

[59] *Id.*

[60] P. P. Aitken, D. R. Eadie, G. B. Hastings, & A. J. Haywood, "Predisposing Effects of Cigarette Advertising on Children's Intentions to Smoke When Older," *British Journal of Addiction* 86: 383-390 (1991).

[61] U.S. Department of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General*. Public Health Service, Centers for Disease Control,

FDA agrees that none of these kind of studies is sufficient to establish that advertising has the effect of directly causing minors to smoke tobacco products, or determine directionality [predictability of someone starting smoking].[62]

These defects reduce the FDA's justification that the restrictions on the advertising (e.g., black-and-white, text-only print ads and prohibition of billboards within 1,000 feet of elementary and secondary schools and public playgrounds) will advance the goal of reducing underage smoking "in a direct and material way."[63] However, there is no doubt that the efforts to restrict tobacco distribution among adolescents (e.g., requiring age verification in purchasing tobacco, banning vending machines, and banning free samples, and the sale of single cigarettes) could substantially reduce underage smoking by directly regulating tobacco distribution rather than the information about tobacco. Therefore, despite debates over the impact of tobacco advertising, the FDA rule might pass the third test of *Central Hudson*.

Is the regulation more extensive than necessary to achieve that interest?

As originally formulated, this prong is notable for its imprecision. Subsequent litigation of this prong has demonstrated that this standard of review may range anywhere from a "least restrictive means" test to a significantly more deferential and no more precise "reasonable fit" standard.[64]

Centers for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, DHHS Publication No. (CDC) 89-8411(1989).

[62] Ira Teinowitz, "FDA's goal in curbing cigarette ads: 'To Address Death'" *Advertising Age* (September 9, 1996).

[63] Rubin, 115 S.Ct. at 1592 (quoting Edenfield, 113 S.Ct. at 1798).

[64] Board of Trustees v. Fox 492 U.S. 469 (1989). Writing for the majority, Justice Scalia concluded that the standard is "something short of a least-restrictive standard." Scalia's position stemmed from the need to establish a standard lower than that accorded pure speech.

The FDA agrees with a "reasonable fit" standard and thinks that its regulation meets this requirement by restricting only those elements of advertising and promotion that affect young people, while preserving those aspects of advertising that provide information to adults.[65] However, advertising groups raise a common First Amendment question of 'Is it of reasonable time and manner or an overall restraint on free speech?'[66]

The FDA rule restricts print ads in publications to black-and-white, text-only format if more than 15% (or 2 million) of their readership consists of minors under age 18. However, it is not clearly addressed why this precise figure should be applied in restricting publications with still significant amount of adult readers, say 84%. The rule also prohibit the sponsorship of events (e.g., motor sports) under the tobacco brand name. According to a study (cited by the FDA), children or adolescents comprised less than 7% of the total viewing audience of 915 million for motorsport events in 1992.[67] Though the FDA argues that its rule is narrowly tailored, the high percentage of adult viewership (93%) in motorsports seems not sufficient to persuade the advertising people who complains that the FDA rule is arbitrary, capricious, and irrational.

Under these circumstances, current commercial speech cases in alcohol advertising shed a light toward interpreting the reasonable fit standard between the measures imposed and the intended government interest.

In *Rubin v. Coors Brewing Co.*, the Court rested its opinion on the government's failure to show that the regulation directly advanced the asserted government interest.

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[65] U.S. Food and Drug Administration, *Executive Summary: The Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, (last revised August 1996) <http://fdabbs.fda.gov/opacom/campaigns/tobacco/execrule.html>.

[66] Ira Teinowitz, "Historic Attack on Cigarette Marketing—Tough regulations for Tobacco," *Advertising Age* (August 26, 1996)

However, the Court went on to suggest that the regulation also would not survive First Amendment scrutiny because it was "not sufficiently tailored to its goal."[68] *Coors* suggested several alternatives to the label ban and the Court agreed that "the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to … First Amendment rights, indicated that the regulation is more extensive than necessary."[69]

In *44 Liquormart, Inc. v. Rhode Island*,[70] the Court was persuaded that *Posadas* erroneously performed the First Amendment analysis. The Court suggested that "*Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy."[71] The *Posadas* majority's conclusion on that point was regarded to be "not [reconcilable] with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available."[72] Consequently, the Court decided that "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate."[73]

The alternative is to assume that information is not in itself harmful, that people will perceive their own best interests, if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close

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[67] J. Slade, "Tobacco Product Advertising During Motorsport Broadcasts: A Qualitative Assessment," paper presented to the 9th World Conference on Tobacco and Health (October 10-14, 1995).

[68] 115 S.Ct. at 1593.

[69] *Id.* at 1593-1594.

[70] 116 S.Ct. 1585.

[71] *Id.* at 1511.

[72] *Id.*

[73] *Id.*

them.[74] It would seem that directly banning a product (or taxing it, controlling its prices, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be, and thus virtually all restrictions with such a purpose would fail the fourth prong of the Central Hudson test.[75]

The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny.[76] Certainly, there are many ways that the government can reduce the demand for cigarettes. For example, the government could use counterspeech, or gradually reduce the level of addictive nicotine.[77] Furthermore, such methods would not infringe on a constitutional right.

Alternatives to speech restriction

In order to prevent tobacco sales from young people, we need to take a look at overall marketing activities of tobacco companies. The American Marketing Association has defined marketing as "the process of planning and executing conception, pricing, promotion, and distribution of ideas, goods, and services to create exchanges that satisfy individual and organizational objectives."[78] From the definition, we can see four major marketing factors in managing a company or business: product, price, place (distribution channel), and promotion. These factors also work in tobacco sales and advertising is just one of them. Therefore, it will be more effective if the FDA considers all those factors to reduce children's easy access to tobacco products, not focusing solely on promotional aspects (e.g., advertising, sponsorship, giveaways, etc.).

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[74] Virginia State Bd. of Pharmacy, 425 U.S. 748 (1976).

[75] 44 Liquormart, Inc., 116 S.Ct. at 1519.

[76] *Id.* at 1521.

[77] *See* findings contained in H.R. 1853, 104th Cong. § 2 (1995).

Product regulation:

Other smoking policies may offer more promise than simply intensifying the current restrictions on tobacco advertising. The first approach is to regulate tobacco product directly. The typical regulatory strategy in other risk contexts is to foster technological solutions to safety.[79] For example, mandated changes in technology, such as catalytic converters for autos and guards on machines, reduce the risks posed by the product. The introduction of filter cigarettes and the various "light" cigarettes are in the same vein. Companies altered the attributes of the product, reducing the estimated risk, but at some cost to other product attributes, such as taste.

The most dramatic technological change of this type was the introduction of the smokeless cigarette—Premier—by R. J. Reynolds.[80] The Premier cigarette represented a substantial technological breakthrough in cigarette design. Rather than lighting tobacco, the consumer lit a carbon tip at the end of the cigarette. This carbon tip in turn heated up an aluminum chamber filled with porous beads coated with tobacco extract. As these crystals vaporized, the smoke then passed through tobacco filters and through a conventional filter before being inhaled. There was no tobacco burned with this cigarette. Smokers could continue to enjoy the sensation of smoking and the associated value they placed on nicotine. By eliminating burning tobacco and the hazards linked to it, the

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[78] Peter D. Bennett, *Dictionary of Marketing Terms* (Chicago: American Marketing Association, 1988), at 115.

[79] W. Kip Viscusi, *Smoking: Making the Risky Decision*, (New York, Oxford University Press, 1992).

[80] *Id.* at 146.

product altered the taste and potential hazards of cigarettes to a greater extent than any of the previous cigarette innovations.[81]

However, this technological innovation has met with government criticism and antismoking groups were reluctant to support safer cigarettes since they hope to eliminate smoking altogether by restricting the market to conventional, higher-risk cigarettes. Government officials attacked the Premier as a "nicotine delivery device." Whereas in other risk regulation contexts the government has mandated safety-related improvements, in the cigarette case it has actively discouraged the most important safety-related breakthrough in cigarette design.

In 1991, Philip Morris introduced "de-nicotined" cigarettes in the market. These cigarettes contained approximately 0.1 milligrams of nicotine per cigarette, as compared with 0.9 milligrams for the Marlboro brand.[82] However, several antismoking groups criticized the company because of alleged health-related claims being made. Because nicotine does not affect cigarette flavor, these critics claimed that any mention of nicotine was necessarily a health claim.

As above, safety innovations in tobacco products have been discouraged by the government policies, which were more concerned about smoking rates rather than health outcomes. However, the expected smoking risk resulting from those policies will be greater if safer cigarettes are encouraged and consumers are given the information needed to properly assess their risks.

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[81] *Id.*

[82] *Id.* at 148.

Even today, product innovation for safety is continued such as the Eclipse smokeless cigarettes by R. J. Reynolds.[83] At this time, government support is necessary to promote market competition for safer products.

Price Regulation:

The second alternative to speech restriction is related to tobacco price. From the standpoint of the consumer, a rise in price is tantamount to decreased availability and vice versa. Thus, price affects consumer demand. For example, the mean per capita consumption of alcohol in Ontario between 1928 and 1974 varied inversely with the unit price of alcohol in constant dollars and a similar relationship has been shown for several European countries.[84] Saffer and Grossman estimated that simply increasing the rate of excise tax on alcohol at the rate of inflation would lead to a significant decrease in the number of 18 to 21 year olds killed in alcohol-related automobile crashes.[85] Coate and Grossman showed that increasing the price of beer through a similar taxation policy sharply reduced reported drinking among adolescents.[86] Similarly, smoking may have inverse relationship with the level of taxation on cigarettes.

An extensive set of studies of cigarette smoking demand indicates quite consistently that the nature of consumers' demand for cigarettes is not entirely dissimilar from their demand for other products. Viscusi (1992) analyzed the forty-one studies that have examined the price and income elasticities (i.e., percentage change in cigarette demand in response to a percentage change in price or income) of cigarette demand.[87] The study indicates that cigarette consumption increases with income but less than proportionally and more affluent individuals are likely to purchase cigarettes. Despite the diversity of approaches in the literature, most of the demand elasticities clustered in the range [from -0.4 to -0.1] and, most strikingly, every study in the analysis was able to generate estimates that indicate a negative elasticity of demand for cigarettes.[88] As one would expect with a normal economic good, the demand curve for cigarettes slopes downward; as the price of cigarette declines, consumers increase their demand for the product. Similarly, price increases for cigarettes will reduce consumer demand.

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[83] Robert M. McMath, "Smokeless isn't Smoking: Despite Research That Would Discourage Others, R. J. Reynolds is Making a Second Attempt to Launch a Virtually Smokeless Cigarette," *American Demographics* 18: 60 (1996).

[84] Avram Goldstein & Harold Kalant, "Drug Policy: Striking the Right Balance," *Science*, 249: 1513-1521 (1990).

[85] H. Saffer & M. Grossman, "Beer Taxes, the Legal Drinking Age, and Youth Motor Vehicle Fatalities," *Journal of Legal Studies* 16: 351-374 (1987).

These effects are particularly great in the case of teenagers, who appear to be most sensitive to the price. The evidence is, however, somewhat mixed, as some studies indicate greater price responsiveness by teenagers[89] and other studies indicate no difference between teenagers and adults.[90] However, no studies suggest that teenagers are less responsive to prices than adults. Furthermore, the previous studies of Irish adolescents have shown consistently that spending money is related to tobacco use.[91] Thus, it seems that price should influence adolescent smoking behavior.

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[86] D. Coate & M. Grossman, "Effects of Alcoholic Beverage Prices and Legal Drinking Ages on Youth Alcohol Use," *Journal of Law and Economics* 31: 145-171 (1988).

[87] W. Kip Viscusi, *supra* note 79.

[88] *Id.* at 105-106.

[89] E. M. Lewit, D. Coate, & M. Grossman, "The Effects of Government Regulation on Teenage Smoking," *Journal of Law and Economics* 24: 545-569 (1981).

[90] J. Wasserman, W. G. Newhouse, & J.D. Winkler, "The Effects of Excise Taxes and Regulations on Cigarette Smoking," *Journal of Health Economics* 10: 43-64 (1991).

[91] J. W. Grube, S. McGree & M. Morgan, "Smoking Behaviors, Intentions and Beliefs Among Dublin Primary School Children," *The Economic and Social Review*, 15: 265-288 (1984).
A. O'Rourke, N. O'Sullivan & K. Wilson-Davis, "A Dublin Schools Smoking Survey, Part II: Smoking and Attitudes," *Irish Journal of Medical Science* 1: 463-470 (1968).

The price responsiveness of cigarette demand implies the potential role of taxes as a policy instrument for reducing underage smoking behavior. Therefore, increasing the price of tobacco through a taxation policy should be given some consideration for the purpose of the FDA rule.

Distribution Channel:

The third consideration to achieve the FDA's goal is to manage tobacco distribution more strictly.

A basic assumption of the FDA is that advertising causes children to start smoking and that reducing advertising would affect underage smoking. However, even if the FDA succeeds in deterring tobacco advertising from children, young people still can access tobacco products through various distribution channels because advertising is not the only contentious element of the industry's marketing mix.

To reduce children's easy access to tobacco products, the FDA rule also bans vending machines except in certain nightclubs and other adult only facilities totally inaccessible to persons under 18 and requires age verification by photo ID for anyone under the age of 27 in purchasing tobacco products. This attention to distribution channels advances the rule one step ahead of the previous regulations which were mostly dealing with the tobacco advertising.

However, despite laws in all 50 states that prohibit sales to minors, numerous studies show that adolescents have little difficulty purchasing tobacco products. Studies indicate that the vast majority of tobacco retailers sell to children.[92] A recent survey found that over 77 percent of smokers under the age of 18 reported never having been asked for proof of age when purchasing cigarettes in a store in the 30 days preceding the survey.[93] Significant number of young people successfully purchase smokeless tobacco as well, with 90 percent of smokeless tobacco users in junior high and high school saying they buy their own smokeless tobacco.[94] The reason is that there was little enforcement of the laws prohibiting tobacco access to minors with few exceptions. Therefore, it is unlikely that a minimum smoking age can have any effect unless accompanied by relatively strict compliance by retail suppliers of tobacco and by enforcement on the part of the authorities.

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[92] Doctors and Lawyers for a Drug-Free Youth. *Cigarette Readily Sold to Children in 90 U.S. Communities. Tobacco Legislation Recommended* (Champaign, IL: Doctors and Lawyers for a Drug-Free Youth, 1991).

Other studies indicate that actively enforced access restrictions have been effective. For example, a comprehensive community intervention in Woodridge, Illinois involving retailer licensing, regular compliance checks, and penalties for merchant violations, reduced illegal sales from 70 percent to less than five percent in under two years. Rate of both experimentation and regular smoking decreased more than 50 percent among seventh and eighth grade students in this community.[95] The effects of such laws (minimum purchase age) are also found in the cases of alcohol consumption. Cross-sectional survey research has shown that adolescents from locales with higher drinking

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D Altman, V. Foster, T. Rasenick-Douss, & J. Tye, "Reducing the Illegal Sales of Tobacco to Minors," *Journal of the American Medical Association* 261: 80-83 (1989).

[93] State of Connecticut v. Philip Morris, Inc.; R. J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Co., etc. (July 18, 1996), n. 230 <http://www.tobacco.neu.edu/AG/Ct/5concomp.htm>.

[94] U.S. Department of Health and Human Services, *Youth Use of Smokeless Tobacco: More than a Pinch of Trouble.* USDHHS, Office of Inspector General. Control No. P-06-86-0058, (1986).

[95] L. A. Jason, et al., "Active Enforcement of Cigarette Control Laws in the Prevention of Cigarette Sales to Minors," *Journal of the American Medical Association* 266: 3159-3161 (1991).

ages are more likely to be abstainers and less likely to be heavy drinkers.[96]They also reported less peer approval of drinking, less frequent peer drinking, fewer incidents of drinking and driving, and fewer incidents of intoxication.[97]

Therefore, the FDA rule would effectively and more directly deter underage access to tobacco if the rule is more strictly enforced with regular and unannounced inspections on tobacco distribution channels (e.g., by convenience stores, mail orders, etc.) and stronger sanctions against tobacco retailers and distributors who sold the product to underage people.

Promotion: Counter speech

The final solution to consider for curbing underage smoking is through the promotion of anti-smoking messages. In this country, the public school system has been given the primary responsibility for developing and implementing programs to discourage youngsters from starting to smoke.[98] Schools have responded by disseminating information about the health risks of smoking. However, about the same percentage (19%) of U.S. high school seniors smoke today as did ten years ago, despite their greater health knowledge.[99] It is, probably, because school-based programs cannot be completely effective in preventing adolescent tobacco use unless they are supported by environmental changes that reduce the physical and social availability of tobacco to youth.

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[96] S. A. Maisto & J. V. Rachal, "Indication of the Relationship Among Adolescent Drinking Practices, Related Behaviors, and Drinking Age Laws," in H. Wechler (ed.), *Minimum Drinking Age Laws* (Lexington, MA: Heath, 1980), 155-176.

[97] *Id.*

[98] Cornelia Pechmann & S. Ratneshwar, "Advertising Versus Prior Beliefs: Does Cigarette and Anti-Smoking Advertising Alter Young Adolescents' Perceptions of Smokers?" *Marketing Science Institute Report* No. 93-125 (Cambridge, Massachusetts: Marketing Science Institute, December 1993).

[99] U.S. Department of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General*. Public Health Service, Centers for Disease Control.

More than twenty years ago, Kotler and Zalman advocated social marketing as a useful means of implementing social change, arguing that "the application of marketing to social goals is a natural development and on the whole a promising one."[100]

One of the most effective way to promote anti-smoking may be through mass media campaign. The research findings by Pechmann and Ratneshwar suggest that ads with health-related themes ("smoking will make you short of breath") can remind youngsters of, and bolster, their beliefs that smoking is unhealthy and unwise, and ads with psychosocial themes ("no one wants to date a smoker anymore") can help create the impression that smokers are unglamorous and immature.[101] Especially, the latter effect should help immunize youths against the myths about the positive psychosocial consequences of smoking (such as that smokers are cool, sexy, independent, popular, etc.).

There are other ways to educate children and adolescents about the hazards of smoking. Ironically, various techniques of tobacco promotion, which will be restricted by the FDA rule, can be also used to promote anti-smoking messages. For example, anti-tobacco advertisements on billboards and other outdoor advertising are encouraged within 1,000 feet of elementary and secondary schools and public playgrounds. These are places where children and adolescents spend a great deal of time and where they can be influenced by exposure to anti-smoking messages. Promotional items (e.g., tee shirts, caps, sporting goods, etc.) could be used for the same purpose by displaying negative

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Centers for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, DHHS Publication No. (CDC) 89-8411(1989).

[100] Philip Kotler & Gerald Zaltman, "Social Marketing: An Approach to Planned Social Change," *Journal of Marketing* 35: 3-12 (1971).

[101] Pechmann, & Ratneshwar, *supra* note 98.

effects of smoking with bright and colorful pictures or words. Finally, various educational events can be held to reinforce the effectiveness of the anti-smoking campaign. For example, an essay contest or art exhibition on the subject of the smoking problem could be considered. If the FDA has banned these promotion techniques from tobacco companies for fear of their impact on adolescents, they should also be applicable to the anti-smoking campaign.

There are numerous other factors, however, that influence whether youths start to use cigarettes.[102] In particular, socialization processes,[103] including peer pressure and parental and sibling influences, are important.[104] According to Grube and Morgan, parent groups can provide a major impetus to counter adolescent smoking.[105] Research on parent groups has shown that they can address significant aspects of the home and family, the peer group, the schools and the larger community that potentially decrease the physical and social availability of tobacco, alcohol and other drugs to youth.[106] For this reason, parents also should be targeted in anti-smoking campaigns so that they can establish consistent guidelines and rules for their own children regarding tobacco and to keep one another informed of infractions of these rules.

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[102] U.S. Department of Health and Human Services, *supra* note 99.

[103] George P. Moschis, "Social Comparison and Informal Group Influence," Journal of Marketing Research 13: 237-244 (1976).
George P. Moschis, "The Role of Family Communication in Consumer Socialization of Children and Adolescents," Journal of Consumer Research 11: 898-913 (1985).

[104] Richard J. Eiser & Joop van der Pligt, "Attitudinal and Social Factors in Adolescent Smoking: In Search of Peer Group Influence," *Journal of Applied Social Psychology* 14: 348-363 (1984).
Nancy P. Gordon, "Never Smokers, Triers and Current Smokers: Three Distinct Target Groups for School-based Antismoking Programs," *Health Education Quarterly* 13: 163-180 (1986).
Alfred L. McAlister, Jon. A. Krosnick & Michael A. Milburn, "Causes of Adolescent Cigarette Smoking: Tests of a Structural Equation Model," *Social Psychology Quarterly* 47: 24-36 (1984).
George P. Moschis, "Point of View: Cigarette Advertising and Young Smokers," *Journal of Advertising Research* 29: 51-60 (1989).

[105] Joel W. Grube & Mark Morgan, *The Development and Maintenance of Smoking, Drinking and Other Drug Use Among Dublin Post-Primary Pupils*, (Dublin: The Economic and Social Research Institute, 1990).

[106] *See, e.g.*, M. Klitzner, E. Bamberger, & P. J. Gruenewald, "The Assessment of Parent-Led Prevention Programs: A National Descriptive Study," *Journal of Drug Education* 20: 111-125 (1990); M. Klitzner, P. J. Gruenewald, & E. Bamberger, "The Assessment of Parent-Led Prevention Programs: A Preliminary Assessment of Impact," *Journal of Drug Education* 20: 77-94 (1990).

Conclusion

Through *Central Hudson*'s test we have found that the FDA rule has a legitimate goal of preventing tobacco use from young people. Furthermore, the final rule of the FDA tobacco regulation will undoubtedly have an impact on a minor's decision whether to take up the habit. However, insofar as the tobacco business is a lawful activity and the speech is not misleading, tobacco advertising is qualified for First Amendment protection.

This article's later discussion demonstrates the availability of anti-smoking measures that are less restrictive of First Amendment interests than the proposed FDA rule. Though the rule managed to satisfy the former three elements of *Central Hudson* test, the availability of less restrictive alternatives has kept the rule from passing the fourth test. The final test requires that the selected means to achieve FDA's regulatory goals are narrowly tailored and not more than extensive than is necessary. However, the FDA rule still has placed too much emphasis on the promotional aspect among the four market tools to prevent tobacco products from alluring young people.

If the rule takes into account every marketing aspect altogether, the challenged FDA rule can advance the government's interest in reducing underage smoking in a more direct and material way. For example, by guiding the industry to compete for safer products, the FDA can save not only the potential tobacco triers but also the lives of already addicted people. With higher taxes on tobacco products, the demand can be reduced and the additional money from the tax can be used for anti-smoking campaigns. The money may also be allotted for the costs in distribution channel management such as administrative and monitoring costs. Consequently, the fit between the FDA's ends and the means chosen to accomplish those ends may become much more reasonable and the artificial and arbitrary manipulation of information (e.g., black-and-white, text-only format) will be avoided.

Point and Click for the "Right to Know": An Analysis of the Electronic Freedom of Information Act of 1996

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Point and Click for the "Right to Know": An Analysis of the Electronic Freedom of Information Act of 1996

(Abstract)

After five years of hearings, floor debates and compromises, Congress passed the Electronic Freedom of Information Act (EFOIA) on October 2, 1996. Legislators crafted the law because new rules were needed to overcome obstacles in obtaining information from federal agencies in this era of new technology. Increasingly, government information is recorded and stored in electronic form.

The purpose of this paper is to examine the history and content of the EFOIA to shed light on how the EFOIA crafters identified the problems of access in the computer age. The research question this paper explores is: How effective is the EFOIA in meeting the needs of access to government in the era of electronic record keeping and information storage?

INTRODUCTION

After five years of hearings, floor debates and compromises,[1] Congress passed the Electronic Freedom of Information Act[2] on October 2, 1996. The EFOIA, technically an amendment to the Freedom of Information Act of 1966, was crafted to ensure continued access by the public to government-held information. Legislators came to realize that new rules were needed to obtain information from federal agencies in this age of new technology, because government increasingly is using computers to store and record information.[3]

When the FOIA was signed into law 30 years ago, legislators did not consider the implications of electronically-stored information. For example, in 1955, when congressional hearings were laying the groundwork for the FOIA, the federal government had 45 computers. Ten years later, when the Senate passed its version of the FOIA, the computer inventory had risen to 1,826. In 1970, the number jumped to 5,277,[4] and quadrupled to 22,000 in 1986.[5]

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[1] In 1991, Sen. Patrick Leahy introduced the Electronic Freedom of Information Act, S. Rep. 1940, 102nd Cong., 2nd Sess (1992). *See also* Senate Hearing before the Subcommittee on Technology and the Law of the Committee on the Judiciary, S. Rep. No. 1940, 102nd Cong., 2nd Sess. (1992); *See also* H.R. Rep. No. 795, 104th Cong. 2nd Sess. (1996).

[2] Pub. L. 104-231, 110 Stat. 3048, 104th Cong., Oct. 2, 1996.

[3] H.R. Rep. No. 795, 104th Cong. 2nd Sess. 11 (1996). *See generally*, Matthew D. Bunker, Sigman L. Splichal, Bill F. Chamberlin and Linda M. Perry, Applying Legal Doctrine to Emerging Technology, 20 Fla. St. U. L. Rev. 543-98, 1993.

Exacerbating the problems of access, the number of FOIA requests that the government receives also has skyrocketed. Agency reports on administration of FOIA operations showed that in 1992 alone, 600,000 requests were filed.[6] As a result, backlogs have become commonplace. In a House committee hearing on the EFOIA in June 1996, government witnesses testified that the FBI had a 4-year-backlog in responding to FOIA requests.[7]

In the face of tremendous growth in the federal government's use of computers, it thus becomes important to examine whether the EFOIA effectively protects the public's statutory right to access to government information. The purpose of this paper is to examine the history and content of the EFOIA to shed light on how the EFOIA crafters identified the problems of access in the computer age. The research question this paper explores is: How effective is the EFOIA in meeting the needs of access to government in this era of electronic record keeping and information storage?

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[4] H.R. Rep. No. 795, 104th Cong. 2nd Sess. 11 (1996).

[5] General Services Admin., Federal Information Resource Management, Microcomputer Survey Report (Sept. 1988).

[6] H.R. Rep. No. 795, 104th Cong. 2nd Sess. 12 (1996). FOIA users include businesses, scholars, scientific researchers, journalists, attorneys and public interest groups.

[7] Opening statement by U.S. Rep. Steven Horn in a hearing on information policy before the Subcommittee on Government Management, Information and Technology of the Committee on Government Reform and Oversight, June 13, 1996. H.R. Rep. No. 104-795, 104th Cong. 2nd Sess. 15 (1996).

In Part I, this paper discusses the legislative history of the FOIA. An understanding of the congressional intent of the FOIA is important to determine whether the EFOIA effectively comports with the purpose of the original law -- namely, to create a statutory right to know backed by a policy of full disclosure.[8] Part II chronicles the 5-year journey that took the EFOIA from its origins as a bill introduced by Sen. Patrick Leahy, to a law signed by President Bill Clinton. Part III examines the content of the EFOIA and covers the law's three main areas: administrative provisions, electronic-information provisions and procedural adjustments. Part IV explores the future implications of the EFOIA in terms of how well the law has addressed the problems of access in the computer age.

PART I: THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act (FOIA)[9] is potentially one of the most valuable tools of inquiry available to the press and members of the general public who want to know what the federal government is doing. Passed by Congress in 1966 and subsequently amended in significant respects,[10] the FOIA creates a judicially enforceable policy that favors a general philosophy of full disclosure of information held by government agencies.[11] The FOIA, which does not apply to state or local government,[12] makes agency records available to "any person" upon request,[13] and places the burden of justifying nondisclosure on the government.[14]

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[8] 5 U.S.C. Sec. 552 (1994). The Court has consistently recognized this principle. *See e.g.* U.S. Dept. of Defense v. FLRA, 114 S.Ct. 1006, 1012 (1994); Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 755 (1989); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220 (1978); U.S. Dept. of the Air Force v. Rose, 425 U.S. 352, 360-361; (1976); EPA v. Mink, 410 U.S. 73, 80 (1973).

[9] 5 U.S.C. Sec. 552 (1994).

The FOIA applies to records held by agencies in the executive branch of federal government, including the Executive Office of the President. It also covers independent regulatory agencies, such as the Federal Communications Commission, the Environmental Protection Agency and the Securities and Exchange Commission.[15] The FOIA does not apply to records held by Congress,[16] the courts,[17] municipal corporations[18] or private

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[10] Congress revised Exemption 1, the national security exception to the FOIA, in 1974; Exemption 3, the statutory exception, in 1976; and Exemption 7, the law enforcement exception, in 1986.

[11] S. Rep. No. 813, 89th Cong., 1st Sess. (1965) and H.R. Rep. No. 1497, 89th Cong. 2d Sess. (1966).

[12] Justin D. Franklin and Robert F. Bouchard, Guidebook to the Freedom of Information Act Chap. 1 at 21-22 (1995), *citing e.g.* DeHarder Investment Corp. v. Indian Housing Finance Authority, 909 F.Supp. 606 (S.D. Ind. 1995).

[13] 5 U.S.C. Sec. 552 (1994).

[14] 5 U.S.C. Sec. 552(a)(4)(B)(b). *See also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 234, 236 (1977); EPA v. Mink, 410 U.S. 73, 79, 87 (1973).

[15] 5 U.S.C. Sec. 552(f) (1984).

[16] *Id.* at 22, *citing e.g.* Goland v. CIA, 607 F.2d 339, 348 (D.C. Cir. 1978). *See also* Dow Jones & Co. v. Dept. of Justice, 917 F.2d 571, 574 (D.C. Cir. 1990)(Congress is not an "agency" for any purpose under the FOIA).

[17] *Id., citing e.g.* Warth v. Dept. of Justice, 595 F.2d 521, 523 (9th Cir. 1979).

[18] *Id., citing e.g.* Rankel v. Town of Greeenburgh, 117 F.R.D. 50, 54 (S.D.N.Y. 1987).

citizens.[19] And it does not apply to the personal staff of the President and some executive-branch agencies, whose sole function is to advise the President, such as the Council of Economic Advisors.[20] To help ensure access, the law requires that federal agencies publish in the Federal Register their organization plans and regulations along with procedures by which the public may obtain information.[21]

In crafting the Freedom of Information Act, Congress recognized it is crucial for citizens in a democracy to have access to government information in order to make informed decisions.[22] But Congress also created nine exemptions, under which federal agencies may refuse to disclose information.[23] A Senate report, which accompanied the legislation for the Freedom of Information Act, declared that the public's statutory "right to know"[24] must be balanced against the government's need to keep some information confidential.[25] Briefly stated, the FOIA does not apply to matters that fall under the categories of (1)classified information and national security, (2) internal agency personnel information, (3) information exempted by statutes, (4) trade secrets and other confidential business information, (5) agency memoranda, (6) disclosures that invade personal privacy, (7) law enforcement investigation records, (8) reports from regulated financial institutions and (9) geological and geophysical information.[26]

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[19] *Id., citing e.g.* Buemi v. Lewis, No. 94-4156, 1995 U.S. App. LEXIS 7816, at 6 (6th Cir. Apr. 4, 1995).

[20] S. Conf. Rep. No. 1200, 93d Cong. 2d Sess. 15 (1974). *See also* Franklin, *supra* note 12, at 23, *citing e.g.* Rushforth v. Council of Economic Advisors, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985).

[21] 5 U.S.C. Sec. 552(a)(3),(4)(A).

[22] "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. ... (The FOIA) provides the necessary machinery to assure the availability of Government information necessary to an informed electorate." H. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* Freedom of Information Act Source Book: Legislative Materials, Cases, Articles 33, (1974) (hereinafter, The Source Book). (The Source Book of the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, is a primary source for the legislative history of the FOIA.) "Although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information." S. Rep. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* The Source Book, at 33.

[23] 5 U.S.C. Sec. 552(b).

Before the FOIA became law, the general public and the press had no legal recourse when they were denied access to government-held information. Until 1966, the Administrative Procedure Act of 1946 (APA) controlled access.[27] Congress passed the APA ostensibly to provide for access to "matters of official record."[28] However, government agencies typically exploited loopholes in the law because the legislation's language was vague

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[24] The term "right to know" has been attributed to a 1945 speech by Kent Cooper, then Executive Director of the Associated Press. He is also the author of The Right to Know (1956).

[25] "At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation." S. Rep. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* The Source Book, *supra* note 22, at 38.

[26] 5 U.S.C. Sec. 552(b).

[27] 5 U.S.C. Sec. 1002 (1946).

[28] *Id.*

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and easily subject to anti-disclosure interpretation.[29] As a result, federal agencies used the APA to restrict access to records, and users of the law regarded it as more of a withholding statute than a disclosure statute.[30]

In 1953, Harold L. Cross, a First Amendment scholar and the attorney for the *New York Herald-Tribune*, said documents and records were routinely withheld by government officials, "acting in the exercise of broad, practically unrestrained" discretion.[31] Cross described agency records as "quasi-confidential, privileged communications, commonly beyond the reach of the public, press or courts."[32] Amid this conflict between the press and federal agencies, an organized effort to gain improved access to government-held information took shape. The movement originated as a collaboration that began in 1955 between access advocate Cross and John E. Moss, a reform-minded Congressman from California. Cross and Moss won the support of the newspaper industry,[33] professional journalists, government reform groups and organizations such as the American Civil Liberties Union and the American Bar Association, and some academic groups.[34] Their efforts started with moves to revise the flawed Administrative Procedures Act and culminated with the passage of the Freedom of Information Act in 1966.

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[29] A 1965 Senate report on the proposed FOIA legislation described the APA as "full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities. ..." S.Rep. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* The Source Book, at 38. A 1966 House report noted that "improper denials (occurred) again and again" under the APA. H. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* The Source Book, *supra* note 22, at 26.

[30] *Id.*

[31] Harold L. Cross, The People's Right to Know 198 (1953).

[32] *Id.* Instances of improper denials based upon the APA continued into the 1960s. H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* The Source Book, *supra* note 22, at 26. For example, the Postmaster General declared in 1959 that the public was not entitled to know the names and salaries of postal employees. *Id.* In 1961, the Secretary of the Navy cited the APA in ruling that Navy telephone directories contained information concerning the internal management of the Navy, and, therefore, were not available for public inspection. *Id.*

When President Johnson signed the Freedom of Information Act into law on July 4, 1966,[35] he echoed the views of the FOIA crafters in a message that accompanied his signature:

> This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtain of secrecy around decisions which can be revealed without injury to the public interest.[36]

The Supreme Court also has recognized the FOIA's important function in keeping the doors of government open, saying the purpose of the law is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[37] The Court also said the FOIA helps ensure "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[38] An examination of the Freedom of Information Act's legislative history reflects a clearly expressed Congressional intent to implement an information policy of full disclosure:

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[33] Echoing widespread support of newspapers across the nation, a June 15, 1966 editorial in the Cincinnati Enquirer declared: "(T)he fact of the matter is that the cloak of secrecy has been stretched to conceal more and more governmental activities and procedures from public view. Many of these activities and procedures are wholly unrelated to the nation's security or to individual Americans' legitimate right to privacy."

[34] Itzhak Galnoor, "What Do We Know About Government Secrecy?" in Government Secrecy in Democracies 290 (1977).

[35] Pub. L. 89-487, July 4, 1966.

[36] Statement by President Johnson Upon Signing Pub. L. 89-487, July 4, 1966, *reprinted in* the Attorney General's Memorandum on the Public Information Section of the Administrative Procedures Act, at II (June 1967).

[37] 425 U.S. 352, 361 (1976).

> Today the very vastness of our Government and its myriad of agencies makes it difficult for the electorate to obtain that "popular information" of which Madison spoke.[39] But it is only when one further considers the hundreds of departments, branches, and agencies that one begins to understand the great importance of having an information policy of full disclosure.[40]

Amending the FOIA

Despite the FOIA's wide Congressional support and its endorsement by key figures in the Johnson Administration,[41] the law's first few years were not as successful in ensuring disclosure as its crafters envisioned. There was a general reluctance by agencies to comply with the law, rendering it, in the words of then-federal judge Antonin Scalia, "a relatively toothless beast, sometimes kicked about shamelessly by the agencies."[42] Federal agencies interpreted the exemptions broadly to justify withholding documents. Officials also used various ploys to discourage use of the FOIA, including high fees for copying documents, long delays and claims that they could not find the documents requested.[43] In great part, this state of affairs was the result of sometimes vague or poorly crafted language in the FOIA.

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[38] 437 U.S. 214, 241 (1978).

[39] James Madison wrote: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Berry (Aug. 4, 1822)', *reprinted in* 9 The Writings of James Madison, at 103 (Gaillard A. Hunt ed., 1910).

FOIA legislators and FOIA commentaries frequently cite this famous quotation by Madison to support a position that access has historic roots traced to the Framers. The philosophy expressed in the quotation indeed can be interpreted in this regard. However, it is important to note that the remark was actually made in the context of expanding a public education system in Kentucky. *See* Paul H. Gates, Jr. and Bill F. Chamberlin, Madison Misinterpreted: Historical Presentism Skews Scholarship, in American Journalism, Vol. 12 No. 1, 38-47 (1996)

[40] S. Rep. 813, 89th Cong. 1st Sess. (1965), *reprinted in* The Source Book, *supra* note 22, at 38.

[41] For example, former Attorney General Ramsey Clark, who served under President Johnson, characterized the policy of full disclosure as the "transcendental goal" of the FOIA. Foreward to the Attorney General's Memorandum on the Public Information Section of the Administrative Procedures Act (1967).

Recognizing, in the words of Senator Edward M. Kennedy, that "the doors of government would (not) be opened to the public,"[44] Congress began amending sections of the Act to clarify and strengthen the law. By early 1973 -- amid concerns about government secrecy as details of the Watergate scandal surfaced -- bills to put teeth in the FOIA were introduced in the House and the Senate:[45] Agencies were required to respond to information requests within 10 days or face a lawsuit;[46] Exemption 1, the national security exemption, was revised, to permit federal district judges *in camera* review of top secret classified information;[47] and search and copying fees were made uniform among the agencies.[48] Congress passed the 1974 amendments twice by overwhelming majorities, overriding President Gerald Ford's veto the second time around.[49]

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[42] Antonin Scalia, "The Freedom of Information Act Has No Clothes," in *Regulation*, March/April, 1982, at 15.

[43] Allan Robert Adler, Litigation Under the Federal Open Government Laws 8 (1995).

[44] Letter to Sen. James O. Eastland, chairman, Senate Committee on the Judiciary, from Sen. Edward M. Kennedy, *reprinted in* The Source Book, at III.

[45] Robert P. Deyling, Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act, 37 Vill. L. Rev. 67 (1992), at 74-75. *See also* James T. O'Reilly, Federal Information Disclosure -- Procedures, Forms and the Law 3-31 (1994).

In 1976, Congress amended the FOIA for the second time because legislators wanted to clarify Exemption 3. This exemption said the FOIA did not apply to information that has clearly been exempted by other laws previously passed by Congress.[50] Congress revised Exemption 3 to override a 1975 ruling by the Supreme Court.[51] The Court broadly construed Exemption 3, and held that an agency administrator possessed wide discretion to withhold requested government records. Congress disagreed.[52] Legislators said the Supreme Court decision allowed an agency administrator

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[46] 5 U.S.C. Sec. 552(a)(6)(A)(i).

[47] 5 U.S.C. Sec. 552(a)(4)(B); H.R. Rep. No. 1380, 93d Cong., 2d Sess. 11 (1974).

[48] *Id.* at 7.

[49] The first vote was 383 to 8 in the House and 64 to 17 in the Senate; Congress overrode Ford's veto 371 to 31 in the House and 65 to 27 in the Senate. 120 Cong. Rec. H10,875 (Nov. 20, 1974) and S19,823 (Nov. 21, 1974).

[50] 5 U.S.C. Sec. 552(b)(3).

[51] Administrator, FAA v. Robertson, 422 U.S. 255 (1975).

[52] In a House subcommittee report accompanying the proposed amendment, Congress specifically stated that the Supreme Court "misconceived the intent of Exemption 3." H.R. Rep. No. 880, 94th Cong., 2nd Sess. pt. 1, 23 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2204-05. *See* Sims v. CIA (Sims I), 642 F.2d 562, 567 (1980).

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"*carte blanche* to withhold any information he pleases."[53] Consequently, Congress revised Exemption 3 to create guidelines that strictly limit an agency executive's discretion to withhold information from the public.[54]

Congress revised Exemption 7, the law enforcement exemption, when legislators amended the FOIA and passed the Freedom of Information Reform Act of 1986.[55] The revised language provided broader exemption protection for law enforcement information and new law enforcement-record exclusions.[56] The 1986 amendment also created new provisions concerning fees and fee waivers.[57]

PART II: ON THE ROAD TO ELECTRONIC ACCESS

Around the time the FOIA was amended in 1986, it already was clear to access advocates and some members of Congress that new obstacles to access had emerged, because government had entered the computer age. Agencies and requesters began to grapple with some fundamental questions: Was a computer record the same as a paper record? If an agency is required to provide a computer record, in what electronic form should it be provided? In other words, can a requester with an Apple computer system get diskettes from an agency's IBM mainframe in a format that can be converted by the requester? Agencies also became concerned. In a 1990 survey by the Justice Department, agencies indicated that they feared costs and delays would greatly increase if a requester could require any computer format compatible with the requester's computer.[58] Agencies wanted to know who should bear the burden of paying for the new costs associated with the computerized storage of information.

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[53] H.R. Rep. No. 880, 94th Cong., 2nd Sess. pt. 1, 23 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2204-05.

[54] *Id.* The 1976 amendment that created the present form of the exemption was included in a rider attached to the Government in the Sunshine Act of 1976 enacted by the 94th Congress. P.L. 94-409, 90 Stat. 1241, codified at 5 U.S.C. Sec. 552(b). The purpose of the Government in Sunshine Act was to open to the public the meetings of about 50 government agencies, boards and commissions.

[55] 5 U.S.C. Sec. 552(b)(7)(1986).

[56] *Id.*

These questions gained increasing significance as the use of computer technology by the federal government became more widespread. By 1994, according to one estimate, the federal government used 25,250 small computers (costing $10,000 to $100,000 each); 8,500 medium computers (costing $100,000 to $1 million each); and nearly 900 large computers (more than $1 million each).[59] Other estimates for the number of computers used by the federal government are even higher.[60]

Against this backdrop of rapid technological advances, Congress moved slowly to take the FOIA into the 21st Century. The

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[57] *Id.* at Sec. 552(a)(4)(A)(1986).

[58] *See* Dept. of Justice, Report on "Electronic Record" FOIA Issues, 11 FOIA Update No. 1 (Winter 1990). In testimony before the Senate in 1992, the Justice Department challenged requirements of electronic FOIA access, contending that a rule that allows the requester to receive information in a preferred format was unreasonable and too costly. Dept. of Justice testimony on S. 1940 before the Senate Judiciary Committee (Apr. 30, 1992), *reprinted in* Dept. of Justice, 13 FOIA Update No. 3, at 8-9 (Spring 1992).

[59] H.R. Rep. No. 795, 104th Cong. 2nd Sess. 10 (1996).

[60] Bunker et al. *supra* note 3, at 559-60, *citing* General Servs. Admin., Federal Equipment Data Center, Automatic Data Processing Equipment in the U.S. Government (April 1990).

law that Congress passed on October 2, 1996 was a House bill[61] (H.R. 3802), but the legislative process began originally in the Senate five years earlier. Sen. Patrick Leahy introduced a bill (S. 1940) on Nov. 7, 1991 to clarify how the FOIA should be applied to agency records in electronic form.[62] Sen. Hank Brown co-sponsored "The Electronic Freedom of Information Improvement Act of 1991." The proposed law defined the term "record" under the FOIA for the first time and included electronically recorded and stored information under the Act.[63] The bill also suggested solutions for easing FOIA backlog problems. The legislation was sent to the Senate Committee on the Judiciary and a hearing was held on the proposed legislation on April 30, 1992, before the Subcommittee on Technology and Law.[64] However, the Subcommittee took no further action on the bill before 102nd Congress adjourned.

The proposed EFOIA legislation was introduced twice more, in 1993 and 1995, but never made it into law. On Nov. 22, 1993, Leahy introduced a slightly modified version of his 1991 bill, "The Electronic Freedom of Information Improvement Act"[65] (S. 1782). The Committee on the Judiciary unanimously approved the

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[61] H.R. Rep. 795, 104th Cong., 2d Sess. 14 (1996).

[62] *Id. See also* S. Rep. 272, 104th Cong., 2d Sess. 5 (1996).

[63] The term "record" applies to "all books, papers, maps, photographs, data, computer programs, machine readable materials, and computerized, digitized and electronic information regardless of the medium by which it is stored, or other documentary materials, regardless of physical form or characteristics." S. 1940, 102nd Cong. 2d Sess. (1992). Sec. 7(1).

[64] S. Rep. 272, 104th Cong., 2d Sess. 5 (1996).

[65] *Id.* at 6.

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bill and it passed the Senate by unanimous consent on Aug. 25, 1995.[66] But again, no further action on the bill was taken in the 103rd Congress. The last version of Senate-proposed EFOIA legislation was introduced by Senators Leahy, Brown and John Kerry On July 28, 1995.[67] "The Electronic Freedom of Information Improvement Act of 1995" (S. 1090) varied slightly from the version passed by the Senate in the 103rd Congress. After revisions were made in consultation with the Office of Management and Budget, the bill was unanimously approved by the Committee on the Judiciary on April 25, 1996,[68] and that is where Senate action on the proposed law ended.

After languishing in the Senate for five years of debate and negotiation, the Leahy-initiated EFOIA bill was introduced as a House bill (H.R. 3802) by U.S. Rep. Randy Tate on July 12, 1996.[69] The bill was co-sponsored by U.S. Reps. Steven Horn, chairman of the Subcommittee on Government Management, Information and Technology; and Subcommittee members Carolyn Maloney and Collin Peterson. After certain reporting requirements and other revisions to Leahy's version were added to the House bill, the House Committee on Government Reform and Oversight favorably reported it to the House of Representatives without further amendment by a unanimous vote on July 25, 1996.[70]

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[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] H.R. Rep. 795, 104th Cong., 2d Sess. 14 (1996).

[70] *Id.*

The legislative history of the EFOIA does not explain why the Leahy-sponsored Senate bill was taken up by the House in 1996 and, ultimately, passed as a House bill. According to Harry A. Hammitt, editor of *Access Reports*, House members had some objections to the Senate version. That is when Horn, Maloney and Peterson took control of the bill with Senate approval to expedite the changes and thus ensure passage of the long overdue legislation in 1996.[71] Included among the changes the House sought are:

- Elimination of an incentive that would allow an agency to retain half of all FOIA fees if the agency fulfilled FOIA-policy expectations for full disclosure within required time limits.[72]

- Inclusion of language that would defer to agency expertise[73] when it comes to determining whether an agency made "reasonable efforts"[74] to search for records in electronic form or format. The EFOIA requires such a search except when such efforts would significantly interfere with the operation of the agency's automated information system.

- Inclusion of more stringent reporting requirements on the part of the agencies. For example, each year agencies must disclose the exact number of agency FOIA requests; the average time it takes to comply with a request; the number of requests rejected; the number of requester appeals filed; the amount of fees collected for processing requests; and the number of agency staff members used to process requests.[75]

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[71] Interview with Harry A. Hammitt on March 21, 1997, by the author of this paper. Hammitt, an attorney and authority on the Freedom of Information Act, was a consultant on the EFOIA bill.

[72] *Id.*

[73] Pub. L. 104-231, 110 Stat. 3048, 104th Cong., at 3, Sec. 6, amending 5 U.S.C. Sec. 552(a)(4)(B) (1996).

[74] *Id.* at 3, Sec. 5, amending 5 U.S.C. Sec. 552(a)(3) (1996).

The legislative history of the EFOIA shows that the main concerns of both its Congressional crafters and its users were that the new law should (1) apply the FOIA policy of full disclosure to electronically recorded and stored information in the same way that the FOIA applies to paper records, film, microfiche or other systems; and (2) ease the serious delays and backlogs that have frustrated FOIA users for years.

U.S. Rep. Carolyn Maloney told a House committee hearing testimony on the proposed EFOIA legislation last June that the FOIA needs to be enhanced with an amendment that applies the FOIA's policy of full disclosure to electronic records.[76] "Access should be the same whether (records) are on a piece of paper or a computer hard drive,"[77] declared Sen. Leahy. He said FOIA law needed to be updated to reflect the advancing use of information technology in government to maintain records. The Senator also pointed to the failure of agencies to comply with the statutory time limits for responding to FOIA requests. "Long delays in access can mean no access at all," Leahy told a House committee considering the proposed EFOIA legislation.[78] "The current time limits in the FOIA are a joke." He said that few agencies actually respond to FOIA requests within the 10-day limit required by law. The legislative history shows that Leahy's sentiments were often echoed by committee members and witnesses who testified before the committee. "One of the biggest frustrations with the Freedom of Information Act is that deadlines are rarely met," U.S. Rep. Peterson said.[79]

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[75] *Id.* at 5, Sec. 10, amending 5 U.S.C. Sec. 552(e) (1996).

[76] H.R. Rep. 795, 104th Cong., 2d Sess. 16 (1996).

[77] *Id.*

[78] *Id.*

PART III: EFOIA CONTENT

The changes made by the EFOIA can be divided into three areas: (1)electronic information provisions; (2) procedural adjustments; and (3) administrative provisions.[80] The electronic provisions make up the core of the bill. The legislation makes clear that the FOIA applies to electronic records[81] and a search for electronic records using software is the.same as a paper search.[82] Under the EFOIA, requesters are permitted to obtain electronic records in any format, regardless of what format an agency uses, provided that the request is not an unreasonable burden.[83] Also, the law requires agencies to assess the records that most requesters are interested in and make those categories available in electronic form.[84]

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[79] *Id.*

[80] This three-pronged division of the new law's structure was presented by Robert Gellman, an attorney and a privacy and information policy consultant, in the Oct. 9, 1966 issue of *Access Reports*. Gellman's observations are informed and helpful. He had served as chief counsel in the 103rd Congress for the congressional predecessor to the Subcommittee on Government Management, Information and Technology and has written extensively on FOIA issues.

[81] Pub. L. 104-231, 110 Stat. 3048, 104th Cong., at 2, Sec. 3, amending 5 U.S.C. Sec. 552(f) (1996).

[82] *Id.* at 2, Sec. 4, amending 5 U.S.C. Sec. 552(a)(2).

[83] *Id.* at 3, Sec. 5, amending 5 U.S.C. Sec. 552(a)(3).

In terms of process adjustments, the law makes two main procedural changes in how the government handles FOIA requests. The first authorizes agencies to establish multi-track processing systems for requests, based on the amount of time the agency requires to provide the information and the timeliness needs of the requester.[85] The second requires agencies to consider special requests for expedited access, as in the case of requests from the news media.[86]

The administrative provisions amend several agency requirements under the FOIA. For example, one provision requires that agencies annually report information such as the number of requests received and the length of request backlogs.[87] The new law also requires that each agency must prepare a guide on how to request records under the FOIA.[88] The guide should provide an index of major information systems along with a description of locator systems. Finally, the EFOIA provides for improving the availability of already disclosed and frequently requested information.[89] This goal to prevent duplicative searches is accomplished by requiring agencies to make available for public inspection and copying any records released under the FOIA that are likely to become the subject of subsequent requests.

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[84] *Id.* at 2, Sec. 4, amending 5 U.S.C. Sec. 552(a)(2).

[85] *Id.* at 3, Sec. 7, amending 5 U.S.C. Sec. 552(a)(6).

[86] *Id.* at 4, Sec. 8, amending 5 U.S.C. Sec. 552(a)(6).

[87] *Id.* at 4-5 Sec. 10, amending 5 U.S.C. Sec. 552(e).

[88] *Id.*

[89] *Id.* at 2, Sec. 4, amending 5 U.S.C. Sec. 552(a)(2).

Some commentators believe that the most significant contribution that the EFOIA makes pertaining to electronic access is that agencies must provide FOIA requesters with computer records in a format chosen by requesters.[90] The language of the law and its legislative history[91] show that the EFOIA overrides two court cases that have been cited as precedent by agencies in the past to justify withholding electronic records.

In *Dismukes v. Dept. of the Interior*,[92] the District Court for the District of Columbia held in 1984 that an agency has no obligation to comply with a FOIA requester's electronic-format preference. In this case the requester, Philip Dismukes, filed a FOIA request with the Department of the Interior for a copy of a computer tape that contained a list of participants in the 1982 bureau of Land Management Simultaneous Oil and Gas Leasing bimonthly lotteries.

The DOI rejected Dismukes' request, saying the requested information was available to the public on microfiche cards. The DOI wanted to provide Dismukes with the information in that form.[93] District Judge Joyce Hens Green acknowledged that the computer tape would offer the "least expensive, most convenient

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[90] Harry A. Hammitt, "Freedom of Information Goes Electronic," *Government Technology*, 18 (January 1997); Robert Gellman, "The New EFOIA Law: One Person's View," *Access Reports*, 3 (Oct. 9, 1997).

[91] H.R. Rep. 795, 104th Cong., 2d Sess. (1996).

[92] 603 F.Supp. 760 (D.D.C. 1984).

[93] *Id.* at 761.

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means of access" to the lottery information compiled by the DOI.[94] However, she ruled against Dismukes, holding that the DOI has no statutory obligation to accommodate his preference. The district court held that the DOI needed to provide only responsive, nonexempt information in a reasonably accessible form and that the DOI's offer to Dismukes satisfied that obligation.[95] The government has recently disowned the *Dismukes* rationale, but in the past agencies have used the case to justify withholding electronic records, providing paper records instead.[96]

The EFOIA also repudiates a 1976 ruling in *SDC Development Corp. v. Mathews*,[97] in which the U.S. Court of Appeals for the Ninth Circuit held that medical databases stored in a computer data bank by a federal agency do not qualify as "agency records" for the purposes of the FOIA. In the Ninth Circuit's *SDC* opinion, which was written by then-Circuit Judge Anthony M. Kennedy, the corporation sought to obtain a compilation of databases of the Medical Literature Analysis and Retrieval System (MEDLARS) from the Department of Health, Education and Welfare. MEDLARS is a computerized system for storing, indexing and retrieving medical bibliographical data. The requested database was developed and is continually updated by the National Library of Medicine, which distributes the information to institutions worldwide. The database contains citations and abstracts of 2 million articles from about 3,000 medical and scientific journals. The information is available on a subscription basis through MEDLINE, the National Library's on-line terminal reference retrieval system and a user can acquire the databases for an annual subscription fee of $50,000.[98]

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[94] *Id.* at 763.

[95] *Id.*

[96] Hammitt, *supra* note 90, at 18.

Instead of paying for a subscription, SDC offered $500 for the databases, an amount it said would exceed the cost of search and duplication of the database information recorded on computer tapes.[99] The agency refused to provide the information, contending that the requested computerized data constituted "library reference materials" and did not qualify as "agency records" under FOIA. SDC brought suit in the District Court for the Central District of California, which upheld the government's decision to withhold the information. The Ninth Circuit affirmed the district court ruling, upholding the government's characterization of the information as "library reference materials," and concluded that the National Library of Medicine was not obligated to provide the MEDLARS database for the nominal cost of duplication.[100]

PART IV: FUTURE IMPLICATIONS OF THE EFOIA

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[97] 542 F.2d 1116 (9th Cir. 1976). The appellant, F. David Mathews, was Secretary of Health, Education and Welfare.

[98] *Id.* at 1117-118.

[99] *Id.* at 1118.

[100] *Id.* at 1121.

An analysis of the EFOIA and a review of some of the early literature on this new law suggests that the future implications of the EFOIA lay mainly in three areas. First, some commentators have expressed concern over how effectively the EFOIA accomplished its goals. Second, some critics assert that important types of emerging technology were not addressed, leaving important gaps unfilled. Last, access advocates speculate that the EFOIA might change a 1989 Supreme Court decision, which interpreted the "core purpose" of the Freedom of Information Act.[101] This opinion has been criticized widely by access advocates who contend that the Court's ruling contravened the FOIA's legislative intent by narrowing the scope of information covered under the law.

EFOIA Effectiveness

The legislators who crafted the EFOIA intended that the law would solve not only the new problems of electronic access but also address long-standing criticisms of the FOIA itself. The effectiveness of the Freedom of Information Act has been criticized for years by journalists who say federal agencies:

- Use procedural ploys to delay or block access.
- Interpret the nine exemptions broadly to justify withholding.
- Claim documents have been lost or transferred to other agencies.
- Delete and redact nonsensitive information on documents.

- Charge high fees for conducting searches and copying records.

Robert Gellman, an attorney who specializes in issues of privacy and information policy, said in an October 9, 1996 issue of *Access Reports* that EFOIA crafters created a potential loophole of "enormous significance" in the law's requirement concerning electronic searches.[102] The EFOIA language requires agencies to make reasonable efforts to search for records in electronic form or format "except when such efforts would significantly interfere with the operation of the agency's automated information system."[103] Gellman contends that this potential loophole is likely to lead to years of litigation and could significantly limit FOIA access.

> This is a new limitation on searching for electronic records that did not exist for paper records. It is a potential loophole of enormous significance that may enable an agency to deny any request for electronic records on procedural grounds. For an electronic-records bill to have included a new limitation on electronic searching is unfortunate and inappropriate.[104]

Gellman also contends there are problems with the new law's two main procedural changes. The first change authorizes agencies to establish multi-track processing systems for requests, and the second provides for expedited access for journalists. His main criticism with the first change is that there are no guidelines to prevent an agency from putting the most sensitive or most time-consuming FOIA requests on the slowest track, which in

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[101] *Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

[102] Gellman, *supra* note 90, at 5.

[103] *Id.*

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effect would become a "dead track" for any sensitive or politically embarrassing requests.[105] Gellman notes an agency is not required to reveal to which track a request has been assigned nor is an agency required to give the requester the option to ask for a faster track. "The strategy for troublesome requests is clear," Gellman writes. "Inform the requester only if he or she asks." With several tracks available, negotiations between a requester and an agency can last for months and create new opportunities for delay.

Gellman objects to what he calls the "more troublesome" expedited-access provision on several grounds, which flow from legislative language that is "filled with vague concepts, undefined words and muddled objectives."[106] For example, a requester can qualify for expedited access if he or she is "a person primarily engaged in disseminating information" and who can demonstrate "urgency to inform the public concerning actual or alleged Federal Government activity."[107]

This definition is "mush,"[108] Gellman said. He explained that the vague language is a result of the legislative process. He said the press pushed for a mechanism that would provide for expedited access, but legislators wanted to find language that would give the press priority without actually saying explicitly

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[104] *Id.*

[105] *Id.* at 6.

[106] *Id.*

[107] Pub. L. 104-231, 110 Stat. 3048, at 4, 104th Cong., Oct. 2, 1996.

[108] Gellman, *supra* note 90, at 7.

that the provision is for the press.[109] The consequence is legislative language that is so muddy that it does not necessarily fit a reporter. In fact, the language arguably can describe a vast class of individuals, including prison inmates and tabloid free-lancers who write about two-headed goats. As a consequence of the expedited-access provision, Gellman argues that agencies now can make news judgments about urgency and newsworthiness. In addition, he claims that the processing of expedited-access requests will use scarce FOIA resources. The EFOIA provides no new resources for searches, so agencies will have to stretch existing resources even further to handle the expedited-request provision. He concludes that only a few requesters actually will be helped by the expedited-access provision and most others will be hurt.

Finally, Gellman believes many requesters will end up worse off because of the time-limit change. Before EFOIA, an agency was required to respond to a FOIA request within 10 days. In order to provide for the processing of an expedited-access request within 10 days under the EFOIA, the time limits for other requests have been extended to 20 days. According to Gellman, requesters who used to get 10-day service will be worse off because they will have to wait longer. "It is widely recognized that the time limits are somewhat of a fiction," he said. "Some meet the 10-day limit sometimes. Others never do. ... Requesters at agencies with large backlogs wait months or years for responses. These agencies will not suddenly begin to meet the new 20-day requirement. Their requesters will not benefit."[110]

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[109] *Id.*

Unfilled Gaps in Technology

Hammitt, an attorney and FOIA authority, believes that the EFOIA did not go far enough. According to Hammitt, the changes to the FOIA should have been "more far-reaching, setting standards for a rapidly evolving technological world."[111]
He raises several important questions concerning technological access issues that were not addressed in the EFOIA.

For instance, he notes that issues of ownership or custody of electronic records were not clarified even though this is already a problem requesters face.[112] To illustrate his point, he uses the example of records downloaded from a listserver or website by a government employee during the course of his or her employment. These records were probably created by a nongovernment third party, he explains, but came into the possession of the federal government during the course of official business. Hammitt notes that this example illustrates several important questions that are not addressed in the EFOIA:[113]

- Whose records are they?

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[110] *Id.*

[111] Hammitt, *supra* note 90, at 18.

[112] *Id.*

[113] *Id.*

- What rules of disclosure are they subject to?

- Must records compiled by the government in electrònic form -- or released on the Internet by the government -- be provided to *noncomputerized* requesters in paper form? In other words, does the electronic disclosure of information satisfy all disclosure requirements under the FOIA?

Despite such technological gaps, Hammitt characterized the EFOIA as "the first congressional recognition that the world of government information is changing and that the statutory rights of access must change to accommodate technological advances."[114]

The EFOIA and the "Core Purpose" Argument

Beginning in 1996, some access authorities and the press[115] began to speculate that an important consequence of the EFOIA is that the law might result in a change in how the Supreme Court has interpreted the purpose of the Freedom of Information Act. Such a change would have far-reaching implications, possibly reversing what many critics contend has been a troubling trend by the Supreme Court to narrowly interpret the public interest in disclosure under the Freedom of Information Act.[116]

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[114] *Id.*

[115] *See e.g.* O'Reilly, *supra* note 45, at Sec. 9.12 (1996 supplement to 1994 edition); Ira Chinoy, "Amendment Seeks to Open Public Files to Digital Diggers," Washington Post, A-17, Sept. 18, 1996; and "Will EFOIA Amendments Affect *Reporters Committee?" Access Reports*, 1-3, Oct. 9, 1997.

[116] *See* Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), and U.S. Dept. of Defense v. Federal Labor Relations Board, 114 S.Ct. 1006 (1994).

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The Supreme Court's current interpretation of the public interest standard set forth in the FOIA stems from a case decided by the Court in 1989. In *Dept. of Justice v. Reporters Committee for Freedom of the Press*,[117] the Supreme Court held that it would be an "unwarranted invasion of privacy" under FOIA Exemption 7(c) to release FBI "rap sheets" on private individuals even though the information is available in state or local public records.[118] The Court reasoned that the "core purpose" of the FOIA is to disclose information that reveals how the government operates or permits the public to evaluate government performance.[119] This opinion has been criticized by access advocates who contend that the Court's ruling contravened the legislative intent of the FOIA by narrowing the scope of information that the law covers.

The *Reporters Committee* decision ended an 11-year effort by CBS reporter Robert Schakne and the Reporters Committee for the Freedom of the Press to obtain the rap sheet -- a record of arrests, indictments, convictions or acquittals -- on reputed crime figure Charles Medico. Schakne was investigating Medico because Medico's company allegedly received defense contracts in exchange for political contributions to the late Pennsylvania Congressman Daniel J. Flood.[120]

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[117] 489 U.S. 749 (1989).

[118] *Id.* at 764-65.

[119] *Id.* at 775.

[120] *Id.* at 757. *See also* "The Press & the Law: Court Bans FOIA Probe of Central Files," *Washington Journalism Review*, 10 (May 1989).

The Supreme Court held that the only public interest to be recognized in a balancing test against the privacy interest is that of revealing "agency action" to keep the press and public "informed about 'what their government is up to.'"[121] Justice John Paul Stevens, writing for the Court, reasoned that disclosure of a computerized compilation of an individual's criminal records, which do not directly reveal governmental operations or performance, is an "unwarranted" invasion of privacy because the information falls "outside the ambit of the public interest that the FOIA was enacted to serve."[122] In other words, the rap sheets did not reveal information about how government operates. In reversing the appellate court decision, the Supreme Court held that the FOIA's "central purpose is to ensure that the government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the government be so disclosed."[123]

In many ways, this is a seminal ruling because the Court declared that the intention of the FOIA was to provide access only to information about government operations or information that reveals the workings of government. In other words, although the government collects vast amounts of information on virtually every facet of society, the press and the public are entitled to have access only to information pertaining to governmental functions. Some commentators believe that the Court's view is a narrow interpretation of the public interest in disclosure as expressed in the legislative history of the FOIA. Access advocates contend that government-held information that does not disclose how government works may lead to information that does.[124] For example, the experiences of persons who have had direct contact with government officials and been involved in government policy are relevant in opening "agency action to the light of public scrutiny."[125]

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[121] *Id. citing* Department of Air Force v. Rose, 425 U.S. 352, 372 (1972).

[122] *Id.* at 775.

[123] *Id.* at 774.

Five years after the *Reporters Committee* decision, the Supreme Court reiterated its narrow interpretation of the FOIA's legislative intent in *U.S. Dept. of Defense v. Federal Labor Relations Authority (FLRA)*.[126] In *FLRA*, the Supreme Court steadfastly maintained that the "core purpose" of the Freedom of Information Act is to ensure disclosure of only information that "contributes significantly to the public understanding of the operations or activities of government."[127] However, *FLRA* also included a strongly worded concurrence that argued against the decision in *Reporters Committee*, asserting that the Supreme Court's narrow interpretation of the public interest in disclosure contravened the legislative intent of the FOIA.

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[124] "(T)he personal experience of those who have had direct contact with government policies are certainly relevant, and quite possible essential, to a determination of what government is doing." Glenn Dickinson, The Supreme Court's Narrow Reading of the Public Interest Served by the Freedom of Information Act. 59 U. Cin. L. Rev. 191, 210 (1990).

[125] 425 U.S. at 361, *citing* 495 F.2d at 263.

[126] 114 S.Ct. 1006 (1994).

In *FLRA*, the Court held that releasing the home addresses of government employees to union organizers would be a clearly unwarranted invasion of privacy under Exemption 6, because the information does not reveal the operations of the government. The controversy in the case arose when two unions[128] asked the Army, Navy and Air Force to release the names and home addresses of agency employees in the bargaining units represented by the unions. The unions sought the information in order to communicate with potential members. The agencies disclosed the names and work stations but refused to release home addresses.[129] The unions filed unfair labor practices charges, and the Federal Labor Relation Authority consequently ordered the agencies to release the information.

The U.S. Court of Appeals for the Fifth Circuit concluded that the home addresses should be disclosed because the public interest in collective bargaining outweighs the interest of federal employees keeping their home addresses private. The Fifth Circuit held that advancing the public interest of collective bargaining "would not constitute a clearly unwarranted invasion of privacy."[130]

On appeal, the Supreme Court reversed the lower court ruling, holding that the disclosure of home addresses would

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[127] *Id.* at 1012.

[128] Local 1657 of United Food and Commercial Workers Union represents a bargaining unit composed of employees of the Navy CBC Exchange in Gulfport, Miss. Local 1345 of American Federation of Government Employees, AFL-CIO, represents a worldwide bargaining unit composed of employees of the Army and Air Force Exchange.

[129] 114 S.Ct. at 1010.

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constitute a clearly unwarranted invasion of privacy.[131] Justice Clarence Thomas, who wrote the opinion for a unanimous Court, concluded that the individual privacy interest that would be protected by nondisclosure is significant.[132] He asserted that the privacy interest of withholding the home addresses of bargaining unit employees substantially outweighs the FOIA's public interest in disclosure.[133]

The *FLRA* opinion turns entirely on the precedent established in *Reporters Committee*: Information that does not directly reveal governmental operations or performance is an unwarranted invasion of privacy because the information falls "outside the ambit of the public interest that the FOIA was enacted to serve."[134] In the *FLRA* ruling, Thomas echoed the sentiment expressed by the Court in *Reporters Committee* -- information contained in the home addresses of agency employees does not shed any light on how government operates. Thomas wrote that the "only relevant 'public interest in disclosure' to be weighed in this balance is the extent to which disclosure would serve the 'core purpose of the FOIA.'"[135] Thomas then defined the Act's "core purpose," citing *Reporters Committee*, as the disclosure of information that

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[130] *Id.* at 1016.

[131] *Id.*

[132] Id.

[133] *Id.*

[134] 489 U.S. at 775.

[135] 114 S.Ct. at 1012.

"contributes significantly to the public understanding of the operation or activities of government."[136]

In a concurring opinion, Justice Ruth Bader Ginsburg noted that she had no choice but to join in the majority judgment in *FLRA*, in light of the precedent set in *Reporters Committee*. However, she strongly disagreed with the *Reporters Committee* opinion, characterizing that ruling as a "restrictive definition of the 'public interest in disclosure.'"[137] Ginsburg argued that the precedent on which the decision was based -- and which she was bound to follow -- "changed the FOIA calculus that underlies ... prodisclosure decisions."[138]

Ginsburg said the "core purpose" argument advanced by the Court in *Reporters Committee* cannot be found anywhere in the FOIA's language.[139] Ginsburg argued forcefully that an FOIA requester is not required to show that disclosure would serve any public purpose, "let alone a 'core purpose' of 'open[ing] agency action to the light of public scrutiny' or advancing 'public understanding of the operations or activities of the government.'"[140]

Ginsburg's view reflects the position of access advocates, who maintain that the narrow public interest standard established in *Reporters Committee* contravenes the FOIA's plain meaning and congressional intent. In other words, the public should be entitled to government-held records that provide a wide spectrum of information -- and not merely information that reveals only how government operates or performs its duties. After all, the government collects vast quantities of information that covers virtually every aspect of American life. Lawyer and FOIA authority James T. O'Reilly writes that a review of the history and purposes underlying adoption of FOIA does not support the Supreme Court's "discovery" of the core-values norm.[141] O'Reilly observes:

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[136] *Id. citing* 489 U.S. at 775.

[137] *Id.* at 1017.

[138] *Id.*

[139] *Id.* at 1019.

[140] *Id.* at 1018.

> The Court has exceeded its role as protector of the commonweal when it created what is an interesting but rootless description of the "public interest." Now that the Court has told the lower courts to look for "core value" adherence by the requester, it has sent the circuits on a fool's errand.[142]

Access advocates believe that the EFOIA may lead to a change in how the FOIA's legislative intent is interpreted because the EFOIA contains a clearly stated legislative purpose set forth by both the Senate and the House. In the Senate report, EFOIA crafters declared that the "purpose of the FOIA is to require agencies of the federal government to make records available to the public through public inspection and upon the request of any person *for any public or private use*." (Emphasis added.) Sen. Leahy, who first initiated legislative action to pass the EFOIA in 1991, has declared that this expression of legislative intent was purposefully included in the findings section of the Senate report to tell the courts that the "core purpose" interpretation distorts the law's intent.[143] He said the reasoning of the Supreme Court in *Reporters Committee* and *FLRA* construed the purpose of the FOIA too narrowly, distorting the broader intent of the Act in ensuring open government.[144]

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[141] O'Reilly, *supra* note 45, at Sec. 9.12 (1996 supplement to the 1994 edition).

[142] *Id.*

The House report that accompanied the legislation articulates the same purpose in nearly identical language.[145] Thus, through the clear expression of the Freedom of Information Act's Congressional intent as plainly stated in the EFOIA legislative history, Congress has told the courts that federal agencies cannot use the "core purpose" argument to justify withholding of information from the public.

SUMMARY AND CONCLUSION

The technological advances of the electronic age represent a potential boon to America's open and democratic society. Computers can empower citizens with an improved, efficient way to evaluate elected officials and bureaucrats, by providing speedy, electronic access to documents and records -- the lifeblood of governance.

The Electronic Freedom of Information Act of 1996 does much to ensure that the public will continue to have access to

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[143] "Will EFOIA Amendments Affect *Reporters Committee?*" in *Access Reports* 2, Oct. 9, 1997.

[144] *Id.*

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government-held information in the electronic age. The EFOIA's administrative provisions, electronic-information provisions and procedural adjustments settled several key issues that had been unresolved. For example, the law establishes that a computer record is the same as a paper record, and an agency is required to provide a computer record in any format that a FOIA requester wishes. In addition, the law attempts to ease the serious delays and backlogs that have frustrated FOIA users for years. The new law creates several tracks for handling requests, so that the most urgently needed information can be processed sooner. This provision also allows the press to ask for expedited service, thus enhancing the press' role as a government watchdog.

Some critics wonder whether the provisions to speed FOIA compliance will really work. They also point out that the EFOIA is still many steps behind the greatest information revolution since Gutenberg invented the printing press -- the Internet. As one FOIA commentator pointed out: What happens when a government employee downloads information from a listserver or website during the course of his or her employment? These records were probably created by a nongovernment third party, but came into the possession of the federal government during the course of official business. Whose records are they? What rules of disclosure are they subject to? If records are compiled by the government and released on the Internet, can *noncomputerized* requesters obtain the records in paper form?

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[145] H.R. Rep., 104th Cong., 2nd Sess. 19, Sept. 17, 1996.

Finally, will the clear statement of legislative intent expressed in the EFOIA lead to a positive change in access law? Access advocates hope the clarified statement of FOIA purpose will prompt action by Congress or the judiciary to override a 1989 Supreme Court opinion, which dramatically narrowed the scope of information available to the public under the Freedom of Information Act.

It is too soon to tell how successfully the recently enacted EFOIA will meet the public's needs for access to government-held information in this modern computer era. However, the law clearly is an important first step. In the words of FOI authority Harry A. Hammitt, the EFOIA represents "the first congressional recognition that the world of government information is changing and that the statutory rights of access must change to accommodate technological advances."

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Blurred Vision: How Supreme Court FOIA Opinions on Invasion Of Privacy Have Missed the Target of Legislative Intent

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AEJMC Law Division Entry

Blurred Vision: How Supreme Court FOIA Opinions on Invasion of Privacy Have Missed the Target of Legislative Intent

(Abstract)

The Freedom of Information Act (FOIA) recognizes it is crucial for citizens to have access to government information to make informed decisions concerning self-rule. However, the law also acknowledges the importance of privacy -- two of the FOIA's exemptions allow agencies to withhold information that would invade the privacy of individuals.

The purpose of this paper is to explore the access-privacy conflict. The examination focuses on the major Supreme Court opinions regarding legal challenges to the privacy interests covered under the two FOIA exemptions. The principal question posed in this analysis asks whether the Court has fairly balanced the conflicting values of access and privacy within the guidelines established by Congress in crafting the FOIA.

INTRODUCTION

The Freedom of Information Act (FOIA or the Act)[1] is potentially one of the most valuable tools of inquiry available to journalists and others who want to know what the federal government is doing. Government agencies collect vast amounts of vital information that can serve the public interest if disclosed, and the Act enables the general public to gain access to much of this material. The FOIA requires that federal agencies provide any person access to all records that do not fall under any one of nine exemptions.[2] Congress created the exemptions to balance the social value of the public's statutory

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[1] 5 U.S.C. Sec. 552 (1994).

[2] 5 U.S.C. Sec. 552(b). Briefly stated, the FOIA does not apply to matters that fall under the categories of (1) classified information and national security, (2) internal agency personnel information, (3) information exempted by statutes, (4) trade secrets and other confidential business information, (5) agency memoranda, (6) disclosures that invade personal privacy, (7) law enforcement investigatory records,

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right to know[3] against the government's need to keep some information secret.

While the Act recognized it is crucial for citizens to have access to government information to make informed decisions concerning self-rule,[4] Congress clearly acknowledged the importance of privacy -- two of the Act's exemptions[5] allow agencies to withhold information that would invade the privacy of individuals. The importance that society places on privacy is also evident in court decisions that have upheld legal protection for a right to privacy.[6] In fact, the Supreme Court has recognized some implicit constitutional protection for privacy.[7]

Predictably, conflicts arise when the need of some

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(8) reports from regulated financial institutions and (9) geological and geophysical information.

[3] The term "right to know" has been attributed to a 1945 speech by Kent Cooper, then Executive Director of the Associated Press. He is also the author of The Right to Know (New York: Farrar, Strauss and Cudahy, 1956).

[4] S. Rep. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* Freedom of Information Act Source Book: Legislative Materials, Cases, Papers (1974), at 38. (Hereinafter The Source Book. The Source Book of the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, is a primary source for the legislative history of the FOIA, containing congressional reports, hearings testimony and other materials.)

[5] 5 U.S.C. Sec. 552(b)6 and Sec. 552(b)7(C). The privacy interests are defined as: "(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy."

[6] *See* W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, Prosser and Keeton on the Law of Torts, 849-868 (St. Paul, Minn.: West Publishing Co., 1984).

[7] Griswold v. Connecticut, 381 U.S. 479 (1965).

citizens to obtain government-held information results in the disclosure of private information on other citizens. The purpose of this paper is to explore the access-privacy conflict. The examination focuses on the major Supreme Court FOIA opinions regarding legal challenges to the privacy interests, which are covered under exemptions 6 and 7(c) of the Act. The principal question posed in this analysis asks whether the Court has fairly balanced the conflicting values of access and privacy within the guidelines established by Congress in the FOIA. In other words: Has the Court exceeded the FOIA's plain meaning[3] and legislative intent in opinions regarding the privacy exemptions? A corollary question flows directly from this query: What, indeed, was the congressional intent for the FOIA and the privacy exemptions?

In an effort to answer these questions, this paper will examine the history and legislative intent of the FOIA along with six Supreme Court decisions that deal with the privacy question, including the most recent opinion to date on the subject. The first section will outline the historic roots of the FOIA to shed light on how political and social forces set the stage for the Act and influenced legislative intent. In the second section, this paper will discuss the FOIA's congressional history because the courts routinely use legislative intent as a key to interpreting the Act. The third section will discuss privacy and clarify the meaning of exemptions 6 and 7(c).

Finally, this paper will analyze six major Supreme Court cases[9] in which the Court made determinations on government refusals to disclose information on grounds that the requested material falls under the privacy exemptions. The conclusion drawn by this analysis will strongly suggest that the Supreme Court has broadly interpreted the privacy interests and narrowly construed the public interest of access, thus permitting agencies to withhold government information that would benefit the public.

I. HISTORIC ROOTS OF THE FOIA

The FOIA, which does not apply to state and local governments, was passed by Congress in 1966. The Act creates a judicially enforceable general presumption that favors disclosure of government-held information to the public.[10] Before 1966, the press and citizens had no legal recourse when they were denied access to government information. The movement to create this legal right has its social and political roots in events that began 21 years before the Act was approved.

The awesome show of nuclear force that brought World War II to a close created a tremendous appetite among the press and

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[8] Plain meaning refers to a statute's structure and actual language, i.e. "the apparent meaning of the statutory text." William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 625.

[9] U.S. Dept. of the Air Force v. Rose, 425 U.S. 352 (1976); U.S. Dept. of State v. Washington Post Co., 456 U.S. 595 (1982); FBI v. Abramson, 456 U.S. 615 (1982); U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989); U.S. Dept. of State v. Ray, 112 S.Ct. 541 (1991); U.S. Dept. of Defense v. Federal Labor Relations Authority, 114 S.Ct. 1006 (1994).

[10] 5 U.S.C. Sec. 552 (1994).

public for information about this powerful and new technology. It also prompted concerns among government officials who said national security was threatened by news accounts in newspapers and magazines that covered military readiness in the dawning era of atomic energy.[11] In an attempt to settle this conflict, Congress passed the Administrative Procedure Act (APA) in 1946,[12] ostensibly to provide for access to "matters of official record."

However, loopholes were typically exploited by government agencies to restrict access to records and the law came to be regarded as more of a withholding statute than a disclosure statute.[13] The legislation's standards were vague and easily subject to anti-disclosure interpretation,[14] thus justifying the withholding of any information "requiring secrecy in the public interest."[15] In addition, under the APA, requesters of information were required to be "properly and directly concerned" with the information sought.[16] This phrase allowed agencies to deny access to persons requesting information if the information did not pertain specifically to the requesters themselves. Critics of the APA were also troubled by the fact that it failed to provide a judicial remedy for confronting agencies that wrongfully withheld information. This allowed any arbitrary and capricious agency decisions to go unchallenged.[17]

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[11] *See* Kathleen L. Endres, National Security Benchmark: Truman, Executive Order 10,290, and the Press, in Journalism Quarterly, Vol. 67, No. 4 (winter 1990).

[12] 5 U.S.C. Sec. 1002 (1946).

[13] A 1965 Senate report on the proposed FOIA legislation described the APA as "full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities. ..." S.Rep. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* The Source Book, at 38. A 1966 House report noted that "improper denials (occurred) again and again" under the APA. H. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* The Source Book, at 26.

[14] *Id.*

[15] 5 U.S.C. Sec. 1002 (1946).

[16] *Id.*

As a result, it became commonplace for federal agencies to abuse the APA to justify withholding information.[18] For example, federal regulatory agencies began almost automatically to withhold the names and salaries of federal employees.[19] In 1959, the Postmaster General declared that the public was not "properly and directly concerned" in knowing the names and salaries of postal employees.[20] In 1961, the Secretary of the Navy ruled that "telephone directories fall in the category of information relating to the internal management of the Navy," and he cited the APA as the authority for his decision.[21] And in 1962, the National Science Foundation concluded it would not be "in the national interest" to disclose cost estimates submitted by unsuccessful contractors who bid on a multimillion-dollar deep

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[17] "For more than 10 years, through the administration of both political parties, case after case of improper withholding based upon (the APA) has been documented. The Administrative Procedure Act provides no adequate remedy to members of the public to force disclosures in such cases." H. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* The Source Book, at 26.

[18] "Improper denials occur again and again. For more than 10 years, through the administrations of both political parties, case after case of improper withholding based upon 5 U.S.C. 1002 (The Administrative Procedures Act) has been documented." *Id.*

[19] *Id.* at 27.

[20] *Id.*

[21] *Id.* at 26.

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sea study. Apparently, some critics claimed that the firm that received the contract was not the lowest bidder.[22]

The rise of government secrecy in the post World War II era, evident in the APA abuses, has been traced by some commentators to a decision by President Harry S. Truman.[23] On Sept. 24, 1951, President Truman issued an unprecedented Executive Order, which for the first time allowed nonmilitary civilian agencies to classify information on grounds of national security.[24] Truman asserted it was necessary to safeguard national security as the specter of Communism loomed over Europe.

As a consequence, the classification of documents became more commonplace and went well beyond military secrets, according to critics. In 1953, Harold L. Cross, a First Amendment scholar and the attorney for the *New York Herald-Tribune*, noted that "there has been a heavy increase of secrecy in several fields."[25] He described agency records as "quasi-confidential, privileged communications, commonly beyond the reach of the public, press or courts."[26]

Amid this escalating conflict between the government and the new media, a movement committed to open government and access to government information began to take shape. The movement was sparked by a collaboration that began in 1955 between New York

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[22] *Id.*

[23] Endres, *see supra* note 11, at 1077.

[24] *Id.* at 1072, *citing* Executive Order 10,290 (1951).

[25] Harold L. Cross, The People's Right to Know (New York: Columbia University Press, 1953), at 9.

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newspaper lawyer Cross and a reform-minded Congressman from Sacramento, California, John E. Moss. Moss and Cross won the support of the newspaper industry,[27] professional journalists, government reform groups and organizations such as the American Civil Liberties Union, the American Bar Association and some academic groups.[28] Their efforts started with moves to revise the flawed Administrative Procedures Act[29] and culminated with the passage of the Freedom of Information Act in 1966.

II. FOIA LEGISLATIVE INTENT

The FOIA applies to records held by agencies in the executive branch of federal government, including the Executive Office of the President, and independent regulatory agencies, such as the Federal Communications Commission, the Environmental Protection Agency and the Securities and Exchange Commission.[30]

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[26] *Id.* at 198.

[27] Echoing widespread support of newspapers across the nation, a June 15, 1966 editorial in the Cincinnati Enquirer stated: "(T)he fact of the matter is that the cloak of secrecy has been stretched to conceal more and more governmental activities and procedures from public view. Many of these activities and procedures are wholly unrelated to the nation's security or to individual Americans' legitimate right to privacy." Also, the Los Angeles Times reported on June 12, 1966 that the proposed FOIA legislation was regarded by many supporters as a "new Magna Carta."

[28] Itzhak Galnoor, What Do We Know About Government Secrecy? (New York: New York University Press, 1977), at 290.

[29] Moss served as head of the Government Information Subcommittee of the House Committee on Government Operations. Between 1955 and 1960, Moss, a Democrat who opposed the Republican Administration's withholding policies, held 173 hearings and investigations and issued 17 volumes of hearings transcripts and 14 volumes of reports. James T. O'Reilly, Federal Information Disclosure -- Procedures, Forms and the Law (New York: Shepard's/McGraw-Hill, Inc., 1994), at 2-5 (meaning Chap. 2 at page 5; 3-5 would mean Chap 3 at page 5, etc.).

[30] 5 U.S.C. Sec. 552(f).

The FOIA does not apply to records held by state governments, Congress, the courts, municipal corporations or private citizens. Nor does it apply to the personal staff of the President and some executive-branch agencies whose sole function is to advise the President, such as the Council of Economic Advisors.[31] To help ensure access, the law requires that federal agencies publish in the Federal Register their organization plans and regulations along with procedures by which the public may obtain information.[32]

In Congress' attempt to ensure open government, legislators also recognized the individual's needs for privacy and the legal protection afforded to privacy over the years. In general, definitions of privacy vary among scholars.[33] An American court first recognized a right to privacy in 1890,[34] acknowledging a call for privacy protection advanced that year by Samuel D. Warren and Louis D. Brandeis in a seminal article published in the Harvard Law Review.[35] The two authors declared that news gathering by the press too often violated the privacy of individuals.

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[31] S. Conf. Rep. No. 1200, 93d Cong. 2d Sess. 15 (1974). *See also e.g.* Rushforth v. Council of Economic Advisors, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985).

[32] 5 U.S.C. Sec. 552(a)(3),(4)(A).

[33] A modern and widely accepted meaning of this right is provided by Professor Thomas Emerson, who wrote that the concept "attempts to draw a line between the individual and the collective, between self and society. It seeks to assure the individual a zone in which to be an individual, not a member of the community. In that zone he can think his own thought, have his own secrets, live his own life, reveal only what he wants to the outside world." Thomas Emerson, The System of Freedom of Expression (Vintage, 1970), at 545.

[34] *See* Keeton, *supra* note 6, at 850, *citing Manola v. Stevens*, N.Y. Sup. Ct. 1890. Although a court had not recognized the right to privacy until 1890, the authors noted that the phrase, "the right to be let alone" had been coined in 1888, *citing* T. Cooley, A Treatise on the Torts, 2d ed. 1888, at 29.

To resolve the fundamental conflict between access and privacy -- that is, to learn what the government is up to sometimes means that private information about citizens must be disclosed -- the FOIA crafters created two privacy exemptions. Exemption 6 protects personal information contained in "personal and medical and similar files,"[36] and Exemption 7 protects personal information in "investigatory records compiled for law enforcement purposes."[37]

A 1965 Senate report reflected the legislative intent behind the crafting of Exemptions 6 and 7(c):

> At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important government rights of privacy with respect to certain information in government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.[38]

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[35] "The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. ... To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual." Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, at 196, 1890.

[36] 5 U.S.C. Sec. 552(b)6 (1994).

[37] 5 U.S.C. Sec. 552(b)7(C) (1994).

[38] S. Rep. 813, 89th Cong. 1st Sess. (1965), *reprinted in* The Source Book, at 38.

The report also makes clear, however, that an information policy of full disclosure is the engine that drives the Act:

> Today the very vastness of our Government and its myriad of agencies makes it difficult for the electorate to obtain that 'popular information' of which Madison spoke.[39] But it is only when one further considers the hundreds of departments, branches, and agencies which are not directly responsible to the people, that one begins to understand the great importance of having an information policy of full disclosure.[40]

Legislators buttressed their arguments for creating a legally enforceable right to access by noting its historic roots in American tradition. They pointed out that the Framers of the Constitution, in creating a democratic system of self-government, recognized the crucial role of public access to information. The works of James Madison[41] and Thomas Jefferson were often quoted by legislators in House and Senate committee reports and Congressional hearings.

The perspective of legislators who crafted the act was also echoed by President Lyndon B. Johnson when he signed the FOIA into law on July 4, 1966: "This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtain of secrecy around decisions which can be revealed without injury to the public interest."[42]

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[39] Madison wrote: "A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Berry (Aug. 4, 1822), *reprinted in* 9 The Writings of James Madison 103 (Gaillard A. Hunt ed., 1910).

FOIA legislatures and commentaries on the Act frequently cite this famous quotation by Madison to support a position that access has historic roots traced to the Framers. The philosophy expressed in the quotation can be interpreted in this regard, however, it is important to note that the remark was actually made in the context of expanding a public education system in Kentucky. *See* Paul H. Gates, Jr. And Bill F. Chamberlin, Madison Misinterpreted: Historical Presentism Skews Scholarship, in American Journalism, Vol. 12, No. 1, 38-47 (1996).

[40] S. Rep. 813, 89th Cong. 1st Sess. (1965), *reprinted in* The Source Book, at 38.

[41] *See supra* note 39.

Despite the FOIA's clear legislative intent, wide congressional support and its endorsement by key figures in the Administration,[43] the law's first few years were not as successful as hoped. There was a general reluctance by agencies to comply with the law, rendering it "a relatively toothless beast, sometimes kicked about shamelessly by the agencies."[44] Federal agencies interpreted the exemptions broadly to justify withholding documents. Officials also used various ploys to discourage use of the Act, including high fees for copying documents, long delays and claims that they could not find the documents requested.[45] In great part, this state of affairs was the result of sometimes vague or even poor draftsmanship of the FOIA. Criticism of the Act ranged from the subtle ("hardly ...

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[42] Public Papers of the Presidents, Lyndon B. Johnson, 1966 II, at 699. Also cited in The Source Book, at 1.

[43] For example, former Attorney General Ramsey Clark, who served under President Johnson, characterized the FOIA's policy of full disclosure as the "transcendent goal" of the Act. Foreward, Attorney General's Memorandum on the Public Information Section of the Administrative Procedures Act (1967).

[44] Antonin Scalia, "The Freedom of Information Act Has No Clothes," in Regulation, March/April, 1982, at 15.

[45] Allan Robert Adler, ed., Litigation Under the Federal Open Government Laws (American Civil Liberties Union Foundation, 19th ed., 1995), at 8.

the apogee of legislative draftsmanship") to the blunt ("primitive and ineffective").[46]

Recognizing, in the words of Senator Edward M. Kennedy, that "the doors of government would (not) be opened to the public,"[47] Congress acted to clarify and strengthen the law through a series of amendments. By early 1973 -- amid concerns about government secrecy as details of the Watergate scandal surfaced -- bills to put teeth in the FOIA were introduced in the House and Senate.[48]

- Agencies were required to respond to information requests within 10 days or face a lawsuit.[49]
- Federal district judges were permitted *in camera* review of top secret classified information.[50]
- Search and copying fees were made uniform among the agencies.[51]
- Requested records need only to be described in a way sufficient to allow an agency to find the category of documents requested.[52]

Congress passed the 1974 amendments twice by overwhelming majorities, overriding President Gerald Ford's veto the second time around.[53] The 1974 amendments sharpened the FOIA, reshaping the law as it stands today.

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[46] See O'Reilly, *supra* note 29, at 3-2, citations omitted.

[47] Letter to Sen. James O. Eastland, chairman, Senate Committee on the Judiciary, from Sen. Edward M. Kennedy, The Source Book, at III.

[48] Robert P. Deyling, Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act., 37 Vill. L. Rev. 67 (1992), at 74-75.

[49] 5 U.S.C. Sec. 552(a)(6)(A)(i).

[50] 5 U.S.C. Sec. 552(a)(4)(B); H.R. Rep. No. 1380, 93d Cong., 2d Sess., 11 (1974).

[51] *Id.* at 7.

[52] *Id.*

III. PRIVACY AND THE FOIA

Among other changes, the amendments expanded protection for privacy. Although Exemption 6 was written in 1966, Exemption 7(c) was not enacted until 1974. The language of Exemption 6, as crafted 30 years ago, remains intact today. Both the Senate and the House reports accompanying the FOIA bill said Exemption 6 required a "balancing of interests" between the individual's right to privacy and the public's interest in obtaining government-held information.[54] According to the Senate Report: "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs and the preservation of the public's right to governmental information."[55]

In making a determination in a privacy-interests case under Exemption 6, the courts first must determine if the records falls within the definition of "personnel," "medical" or "similar" files.[56] Second, the courts must balance the invasion of the individual's personal privacy against the public benefit that would come from disclosure as the Act suggests. To withhold information, the government must show that the disclosure "would constitute a clearly unwarranted invasion of privacy."[57]

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[53] The first vote was 383 to 8 in the House and 64 to 17 in the Senate; Congress overrode Ford's veto 371 to 31 in the House and 65 to 27 in the Senate.

[54] S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965), *reprinted in* The Source Book, at 44. See also H. Rep. No. 1497, 89th Cong. 2d Sess. (1966), *reprinted in* The Source Book, at 32.

[55] *Id.*

[56] 5 U.S.C. Sec. 552(b)6 (1994).

Likewise, the courts use a similar two-step test in deciding a privacy-interests case under Exemption 7.[58] First, the documents must have been complied for law enforcement reasons, because this exemption pertains only to investigative records. Second, the government must prove that the disclosure could "reasonably be expected to constitute an unwarranted invasion of privacy."

A key difference between the exemptions is evident in their statutory language: Exemption 6 calls for a "*clearly* unwarranted invasion" of privacy. On the other hand, Exemption 7 requires a less strict standard, asking an agency to show only that disclosure could "*reasonably be expected* to constitute an unwarranted invasion of privacy." The difference in language was intentional.[59] The legislative history shows that Exemption 7(c), as originally proposed by Senator Gary Hart, also required a "*clearly*" unwarranted invasion of personal privacy.[60] However, the word "clearly" was dropped by the Conference Committee as a concession in negotiations with President Ford[61] to get the Act approved.

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[57] *Id.*

[58] 5 U.S.C. Sec. 552(b)7(C) (1994).

[59] Peter C. Hein, Business Information: Protection and Disclosure, The Freedom of Information Act and Related Laws (1983), at 293.

[60] *Id.*, citing 120 Cong. Rec. 17033 (1974), *reprinted in* FOIA and 1974 Amendments Source Book, at 332 (1975).

By dropping "clearly," the exemption lessened the agency's burden to meet the test.[62] As a result, courts have concluded that Exemption 7(c) allows law enforcement officers more latitude to withhold records to protect privacy than is permitted under the stricter standard of Exemption 6.[63] In addition, 7(c) means the public interest in disclosure carries less weight.[64]

IV. ANALYSIS OF CASES

In a series of key cases on diverse issues -- including access to Nixon's "enemies list," the rap sheets of a Mafia figure and transcripts of government interviews with deported Haitian refugees -- the Supreme Court reviewed how lower courts balanced the statutory right of access established by the FOIA with the privacy interests protected under Exemptions 6 and 7(c).

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[61] *Id.*, citing Conf. Rep. No. 93-1380, 93d Cong. 2d. 11 (1974), *reprinted in* FOIA and 1974 Amendments Source Book, at 229 (1975).

[62] See O'Reilly, *supra* note 29, at 17-44.

[63] U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 755-756 (1989).

[64] *Id.*

In 1976, when the Court first considered a case in which the government refused to disclose information under Exemption 6,[65] the Court established that the privacy interest must be balanced against the public interest of knowing what the government is doing.

Dept. of the Air Force v. Rose (1976)

In the leading case construing Exemption 6, *U.S. Dept. of the Air Force v. Rose,*[66] the Supreme Court held that the term "clearly unwarranted" is the device to balance the public interest in disclosure against the individual right to privacy.[67] The Court's 5-to-3 opinion upheld a request by the student editors of the New York University Law Review for summaries of honor and ethics hearings at the Air Force Academy. The student editors wanted the information for background for an article on disciplinary procedures in the service academies.[68] The hearings explored charges of student cadets cheating or in other ways breaking the strict honor codes at the academies. The Air Force rejected the request for the hearings summaries and refused to provide the documents, even with the names and identifying facts redacted.[69] The Air Force cited Exemption 6's privacy interest, asserting that disclosure would mark the offenders for the rest of their careers.

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[65] Department of the Air Force v. Rose, 425 U.S. 352 (1976).

[66] 425 U.S. 352 (1976).

[67] *Id.* at 382.

[68] *Id.* at 354-356.

[69] *Id.* at 357.

The U.S. District Court for the Southern District of New York granted the Air Force's motion for a summary judgment. However, the U.S. Court of Appeals for the Second Circuit reversed, holding that disclosure under Exemption 6, with names and any identifying information redacted, would not subject any former cadet to public identification and stigma.[70] Justice William J. Brennan, writing the opinion for the Supreme Court, concluded that the release of the information, with the names of the individual cadets deleted, was in the public interest and comported with the purpose of the Freedom of Information Act.[71] Justice Brennan said "the basic purpose of the Freedom of Information Act [is] 'to open agency action to the light of public scrutiny,'"[72] and disciplinary actions against military cadets clearly falls under this category.

Brennan said the legislative intent behind the FOIA directs the courts to balance the privacy interests of the individual against the public interest favoring disclosure so citizens can find out what the government is up to.[73] Brennan cited the Act's statutory language and legislative history in determining that Exemption 6 does not create an absolute right to privacy concerning personnel, medical and similar files.[74] "We find nothing in the wording of Exemption 6 or its legislative history to support the Agency's claim that Congress created a blanket exemption for personnel files,"[75] Brennan wrote.

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[70] 495 F.2d. at 263.

[71] 425 U.S. at 381.

[72] *Id.* at 382.

[73] *Id.* at 373.

In both the Senate and House reports accompanying the proposed legislation for the Freedom of Information Act, legislators indicated that a balancing requirement be used to settle a challenge to the "clearly unwarranted invasion of personal privacy" clause of the exemption. A 1966 House Report said: "The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right to privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual."[76] Similarly, a 1965 Senate Report said: "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny and the preservation of the public's right to governmental information."[77]

Brennan endorsed the ruling by the Second Circuit, which he said made "crystal clear" the Congressional objective: "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[78] The second circuit held that the FOIA's statutory language and legislative history indicate that the exemptions must be narrowly construed.[79] Brennan also cited *EPA v. Mink*, which said the FOIA is "broadly conceived ... to permit access to official information long shielded unnecessarily from public view."[80] The Court, therefore, rejected the government's argument that the balancing requirement applies only to "similar" files and not to "personnel" or "medical" files.[81]

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[74] *Id.* at 371.

[75] *Id.*

[76] H. Rep. 1497, 89th Cong. 2d. Sess., 11 (1966).

[77] S. Rep. 813, 89th Cong., 1st Sess., 9 (1965).

Thus it seems that the *Rose* Court's vision of the FOIA is a broad one, allowing for public access to information held by the government and about government "*activities*" (emphasis added) -- not only information about governmental operations. The key to this broad construction is in the language "to open agency *action* to public scrutiny," (emphasis added) which implies access to what government *does* even if it does not directly reveal how government operates.

Dept. of State v. Washington Post Co. (1982)

After the Supreme Court decided *Rose*, the Court rejected FOIA requests by the news media in three cases, upholding the government's decisions to withhold information on grounds that disclosure would be an invasion of privacy.[82] In the first of these cases, *Dept. of State v. Washington Post*,[83] the Court determined how the term "similar files" in Exemption 6 shall be interpreted. In writing a 9-0 opinion for eight of the nine justices, Chief Justice William H. Rehnquist concluded that the term "similar files" must have a broad rather than narrow interpretation,[84] meaning that a file need not contain intimate information to qualify for withholding under Exemption 6.

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[78] 425 U.S. at 361, *citing* 495 F.2d, at 263.

[79] 495 F.2d at 263.

[80] 410 U.S. at 80.

[81] 425 U.S. at 371-376.

In the *Post* case, the Supreme Court reversed the judgments of the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia, upholding the State Department's decision to withhold information sought by the *Washington Post* regarding two prominent Iranians. In September 1979, the newspaper wanted to confirm an unofficial report that two officials of Iran's revolutionary, anti-American government -- Dr. Ali Behzadnia and Dr. Ibrahim Yazdi -- held U.S. passports.[85] The newspaper asked the State Department for information to determine if the report was true and the government refused, citing Exemption 6.[86]

The State Department asserted that the passport information would qualify as "similar files," and disclosure of this information would be a "clearly unwarranted invasion of

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[82] Department of State v. Washington Post Co., 456 U.S. 595 (1982); Federal Bureau of Investigation v. Abramson, 456 U.S. 615 (1982); Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).

[83] 456 U.S. 595 (1982).

[84] *Id.* at 600.

[85] *Id.* at 596.

[86] *Id.*

privacy."[87] The government also contended that disclosure of the information would "cause a real threat of physical harm" to both men.[88] The D.C. Circuit held that passport information does not qualify as a "personnel," "medical" or "similar" record because it does not contain highly personal information or intimate details about an individual.[89] But in the Supreme Court's view -- because the term "similar files" in Exemption 6 is interpreted to have a "broad rather than narrow meaning"[90] -- a file does not need to contain intimate information to qualify for withholding under Exemption 6.

In his analysis, Justice Rehnquist asserted that Exemption 6's language "sheds little light on what Congress meant by 'similar files.'" He said, however, that the legislative history is "more illuminating," indicating that the phrase "'similar files' was to have a broad rather than narrow meaning."[91] According to Rehnquist's interpretation of House and Senate reports -- which he said did not define the phrase "similar files" -- "Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information."[92] The Supreme Court considered the State Department's argument that the disclosure of this information could place the two Iranian officials in danger. Rehnquist noted a 1966 House report that said:

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[87] *Id.*

[88] *Id.* at 597, n.2.

[89] 647 F.2d. at 198.

[90] 456 U.S. at 600.

[91] *Id.* at 599-600.

[92] *Id.* at 599.

> The limitation of a 'clearly unwarranted invasion of privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information *by excluding those kinds of files the disclosure of which might harm the individual.* (Rehnquist's emphasis)[93]

Additionally, the Court opinion offered excerpts from the State Department affidavit, which said the men could be in danger if the information were disclosed: "Compliance (with the Washington Post's request) would cause a real threat of physical harm" to both men, who "would be in physical danger from some of the revolutionary groups that are prone to violence."[94] In recognizing this potential harm to Behzadnia and Yazdi, Rehnquist rejected the court of appeals' argument that "Congress did not design Exemption 6" to direct the withholding of information on the basis of "physical security of persons stationed or residing overseas."[95]

Finally, it seems that the Court's interpretation of the legislative history seems to back away from the view taken by the Supreme Court in *Rose*. In *Rose*, Brennan said Exemption 6 requires "a balancing of the individual's right to privacy against the preservation of the basic purpose of the Freedom of

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[93] *Id., citing* H. Rep. No. 1497, 89th Cong. 2nd Sess. 11 (1966).

[94] *Id.* at 597, n.2.

[95] 647 F.2d. at 199.

Information Act."[96] He defined the purpose by saying the courts made "crystal clear" that the congressional objective in Exemption 6 is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[97] To follow this line of reasoning, one could reasonably conclude that there is a public interest in understanding why the State Department would grant U.S. passports to officials of the anti-American Iranian revolutionary government. In what seems to be a departure from the public interest standard established in *Rose*, the Court next considered and rejected a request by a journalist to gain access to FBI information.

FBI v. Abramson (1982)

In a 5-to-4 opinion written by Justice Byron R. White in *Federal Bureau of Investigation v. Abramson*,[98] the Court held that records containing information compiled for law enforcement purposes do not lose their Exemption 7(c) status when the information is used for purposes other than law enforcement.[99] The case involved reporter Howard Abramson, who, in June 1976, was investigating President Richard Nixon's alleged use of the FBI to collect derogatory information on his political opponents.[100] When Abramson filed a request under the FOIA for documents concerning FBI information sent to the White House on administration critics -- including journalists Daniel Schorr and Marvin Kalb, Harvard President Derek Bok and actor Paul Newman[101] -- the FBI rejected the request. The agency said release of the information would be an "unwarranted invasion of privacy" under Exemption 7(c).[102] Abramson argued that although the original records may have been compiled for law enforcement reasons, the summaries requested by Nixon were not for such purposes but for purely political reasons.

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[96] 425 U.S. at 382.

[97] *Id.* at 361, *citing* 495 F.2d, at 263.

[98] 456 U.S. 615 (1982).

[99] *Id.* at 624.

[100] *Id.* at 618-619.

The U.S. District Court for the District of Columbia upheld the FBI decision to withhold the records, but the U.S. Court of Appeals for the District of Columbia reversed. The D.C. Circuit held that the FBI had no justification to withhold the information because the White House was not involved in law enforcement.[103] Additionally, the records were compiled "solely for use by the White House for purposes having nothing whatsoever to do with 'law enforcement.'"[104] However, the Supreme Court disagreed. Justice White asserted that the construction adopted by the D.C. Circuit lacked support in the legislative history.[105] White said the issue was whether information originally compiled for law enforcement purposes loses its Exemption 7(c) protection if summarized in a new document not created for law enforcement purposes.[106] In the Court's view, "no express answer is provided by the statutory language or by the legislative history." But White concluded that information initially contained in a record made for law enforcement purposes "continues to meet the threshold requirements of Exemption 7(c) where that recorded information is reproduced or summarized in a new document prepared for a non-law enforcement purpose"[107] -- even if those records were included in a later compilation made for political purposes.[108]

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[101] Marvin Kalb, The Nixon Memo (Chicago: University of Chicago Press, 1994), at 209-212.

[102] *Id.*

[103] 658 F.2d at 812.

[104] *Id.*

Four justices dissented -- Blackmun, Brennan, Marshall and O'Connor -- contending that the Court majority was amending the FOIA with its overly broad interpretation. Justice Harry A. Blackmun, in a dissent joined by Justice Brennan, said the Court opinion ignored the plain meaning of the statutory language.[109] Blackmun said Nixon's use of the FBI information did not meet the threshold question asked in Exemption 7(c): Are the records in question "investigatory records for law enforcement purposes?"[110]

Justice Sandra Day O'Connor, in a separate dissent joined by Justice Thurgood Marshall, observed: "To reach its result, the (majority) Court assumes that, through inadvertence or inattention, Congress' pens slipped while amending Exemption 7 in

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[105] 456 U.S. at 631.

[106] *Id.* at 623.

[107] *Id.* at 631-632.

[108] *Id.* at 624.

[109] *Id.* at 633.

[110] 5 U.S.C. Sec. 552(b)(7)(c) (1994).

1974."[111] She echoed Blackmun's objections. She declared that the statutory language "clearly proclaims that the documents are not exempt from disclosure." She concluded that the disclosure of the records sought was required by the plain meaning of Exemption 7 since, as the court of appeals concluded, the records were compiled for political reasons and not law enforcement purposes.[112] O'Connor asserted that the legislative history fully supports the D.C. Circuit's decision, with which she agreed. Citing a 1965 Senate report, O'Connor said that the "principal purpose" of the FOIA was to "establish a general philosophy of full agency disclosure."[113]

In the *Abramson* ruling, like the *Post* case, which was decided in the same year, the Court majority ruled against a news organization's request to seek government-held information on grounds of invasion of privacy. Both cases are examples of Supreme Court decisions, which through narrow construction of the public interest standard in disclosure, restricted news gathering abilities of journalists. A third case, which also concerned Exemption 7(c), came before the court eight years later with similar results and even more profound consequences.

Dept. of Justice v. Reporters Committee (1989)

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[111] 456 U.S. at 643.

[112] *Id.* at 642.

[113] *Id.* at 641, *citing* S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965).

The Supreme Court held unanimously in *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*[114] that federal agencies can withhold "rap sheets" on private citizens even though the information might be available in public records in local or state offices. Justice John Paul Stevens, writing for the Court, held that the disclosure of compilations of an individual's criminal records is an "unwarranted" invasion of privacy under Exemption 7(c) when the request does not seek official information about government operations.[115]

The decision ended an 11-year effort by CBS reporter Robert Schakne and the Reporters Committee for the Freedom of the Press to obtain the rap sheet -- a record of arrests, indictments, convictions or acquittals -- on reputed crime figure Charles Medico. Schakne was investigating Medico because Medico's company allegedly received defense contracts in exchange for political contributions to the late Pennsylvania Congressman Daniel J. Flood.[116] The U.S. District Court for the District of Columbia upheld the FBI decision to withhold the information based on Exemption 7(c).[117] The D.C. Circuit reversed, concluding that the government cannot claim a privacy interest in records that would be available to the public if sought from the individual agencies.[118]

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[114] 489 U.S. 749 (1989).

[115] *Id.* at 780.

[116] *Id.* at 757.

[117] *Id.* at 757-59.

[118] 816 F.2d 730 (1987).

The Supreme Court held that the only public interest to be recognized in a balancing test against the privacy interest is that of revealing "agency action" to keep the press and public "informed about 'what their government is up to.'"[119] Stevens reasoned that disclosure of a computerized compilation of an individual's criminal records, which do not directly reveal governmental operations or performance, is an "unwarranted" invasion of privacy because the information falls "outside the ambit of the public interest that the FOIA was enacted to serve."[120] In the Court's view, in other words, the rap sheets did not reveal information about how government operates. In reversing the appellate court decision, the Court held that FOIA's "central purpose is to ensure that the government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the government be so disclosed."[121]

Some commentators believe that the Court's view is a narrow interpretation of the public interest in disclosure. They contend that government-held information that does not disclose how government works may lead to information that does.[122] For example, the experiences of persons who have had direct contact with government officials and been involved in government policy are relevant in opening "agency action to the light of public scrutiny."[123] Commenting on the Court decision in *Reporter's Committee*, veteran Supreme Court reporter Lyle W. Denniston said, "a great deal indeed" is disclosed about government if it can be shown that a Congressman was linked to a crime figure who received defense contracts from the Pentagon.[124]

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[119] 489 U.S. at 772-73, *citing* Department of Air Force v. Rose, 425 U.S. 352, 372 (1972).

[120] *Id.* at 775.

[121] *Id.* at 774.

[122] "(T)he personal experience of those who have had direct contact with government policies are certainly relevant, and quite possible essential, to a determination of what government is doing." Glenn Dickinson, The Supreme Court's Narrow Reading of the Public Interest Served by the Freedom of Information Act. 59 U. Cin. L. Rev. 1, at 210 (1990).

The Court's interpretation of the FOIA in *Reporters Committee* narrows the public interest in disclosure established in *Rose*. *Rose* does not speak of access to information that reveals government operations but refers instead to information held by government and about government "activities." Opening "agency *action* to public scrutiny" implies allowing access to whatever government is doing, even if the information does not reveal directly how government operates. Thus the *Rose* interpretation represents a broader vision of the FOIA objective than the interpretation the Court offered in *Reporter's Committee*.

Justice Stevens went beyond the central issue in the case by saying that computerization of personal information poses a special potential threat to privacy. Medico's criminal history of arrests, indictments and convictions are public records, which could be available from the individual law enforcement agencies that investigated and prosecuted him. However, Stevens emphasized that Schakne sought a computerized compilation of all of this information that the FBI put together. "The substantial character of (the privacy) interest is affected by the fact that in today's society the computer can accumulate and store information that would have otherwise surely been forgotten long before a person attains the age of 80, when the FBI's rap sheets are discarded,"[125] he wrote. Justice Stevens noted that "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[126]

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[123] 425 U.S. at 361, *citing* 495 F.2d at 263.

[124] The Press & the Law: Court Bans FOIA Probe of Central Files, in Washington Journalism Review, at 10 (May 1989).

This policy was characterized as unsound in the concurring opinion by Justice Blackmun, joined by Justice Brennan. Blackmun believed that the Court opinion exempting *"all"* rap-sheet information from the FOIA's disclosure requirements was overbroad, based on Exemption 7(c)'s plain language, legislative history and case law.[127] He presented a hypothetical situation in which a rap sheet discloses a congressional candidate's conviction of tax fraud before he ran for office. The FBI's disclosure of that information could not reasonably be expected to constitute an invasion of personal privacy, much less an unwarranted invasion, because the candidate gave up any interest in preventing disclosure of this information when he chose to run for office, Blackmun said.[128]

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[125] 489 U.S. at 771.

[126] *Id.* at 764.

[127] *Id.* at 780-81.

This is a seminal ruling because the Court declared that the intention of the FOIA was to provide access only to information about government operations or information that reveals the workings of government. In other words, although the government collects vast amounts of information on virtually every facet of society, the press and the public are entitled to have access only to information pertaining to governmental functions.

There is support for a broader vision in the legislative history. One commentator[129] said Congress intended that the FOIA was to eliminate the "properly and directly concerned" requirement set forth in the APA and make records available to "any person."[130] Congress eliminated the "properly and directly concerned" criterion to remove any threshold requirement so the general public can request government information.[131] Further, by establishing the personal privacy exemptions as balancing tests, Congress reintroduced the issue of merit into challenges by citizens who wish to get hold of government information.[132] Thus, if the public interest is served by disclosure, the use to which the records are put becomes relevant in balancing the public interest disclosure against the individual's right to privacy. This interpretation suggests a broader vision for the public interest than allowing access merely to information that reveals how government works.

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[128] *Id.*

[129] See Dickinson, *supra* note 122, at 209-210.

[130] S. Rep. No. 813, *reprinted in* The Source Book, at 40. Also, H. Rep. No. 1497, *reprinted in* The Source Book, at 22.

[131] See Dickinson, *supra* note 122, at 209.

[132] *Id.* at 209-210, *citing* Getman v. NLRB, 450 F.2d 670, 677 n.24 (D.C. Cir. 1971).

Dept. of State v. Ray (1991)

In deciding *U.S. Dept. of State v. Ray*[133] in 1991, the Supreme Court concluded that the release of identifying information about Haitian refugees, who were sent back involuntarily to Haiti, could be withheld because disclosure might place them in danger. The issue concerned whether the disclosure of unredacted government reports of interviews with Haitians after they were returned to Haiti "would constitute a clearly unwarranted invasion" of privacy.[134]

The dispute began when a Florida lawyer, who represented Haitian nationals seeking political asylum in the United States, requested the files of Haitians who were returned to Haiti.[135] The files contained information on interviews conducted by the State Department with returned Haitians, to determine whether the Haitian government made good on its promise not to persecute them after they were returned. The State Department provided the lawyer with 96 pages, but the names, living conditions, employment status and other identifying information had been redacted under Exemption 6.[136] Without this information the lawyer could not talk with the Haitians interviewed by the U.S. government to make sure they were not being persecuted by the Haitian government. Consequently, he brought suit against the State Department to obtain the release of the unredacted files.

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[133] Department of State v. Ray, 112 S.Ct. 541 (1991).

[134] *Id.* at 547.

[135] *Id.* at 543-44.

The U.S. District Court of the Southern District of Florida ordered the State Department to release the information, and the U.S. Court of Appeals for the Eleventh Circuit affirmed.[137] The Eleventh Circuit held that there are "significant privacy interests at stake," however those interests were outweighed by the public interest in disclosure.[138] The Appeals Court said the public interest would be served in finding out whether the State Department adequately monitored Haiti's compliance with its obligation not to persecute returnees and whether the U.S. government is "honest to the public" when U.S. officials say Haiti is keeping its word.[139]

The Supreme Court reversed, however, upholding the government's Exemption 6 rationale that disclosure of identifying information was a "clearly unwarranted" invasion of privacy. Justice Stevens, writing the Court's 8-to-0 opinion, concluded that a violation of the Haitians' privacy might expose them to persecution, mistreatment or other retaliatory actions.[140] The

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[136] *Id.*

[137] 908 F.2d 1549 (1990).

[138] *Id.* at 1555.

[139] *Id.*

[140] 112 S.Ct. at 548.

Supreme Court acknowledged there was a public interest in making sure the State Department protected the returned Haitians, but held that upholding their privacy interests to keep them out of harm's way outweighed the public interest in disclosing how well the government followed up on ensuring their safety.[141]

The Supreme Court's reasoning in *Ray* is similar to its reasoning in the *Post* case in that the Court concluded disclosure of an individual's identity constituted a "clearly unwarranted" invasion of privacy if the disclosure could place an individual in danger. The *Ray* court cited *Dept. of State v. Washington Post*,[142] the case concerning the two Iranian officials, in holding that the Haitian's files are "similar files" within the meaning of Exemption 6.[143]

The congressional objective of the Freedom of Information Act has been held in Supreme Court opinions to be a strong presumption in favor of disclosure[144] "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[145] House and Senate reports advance this objective as well. However in *Ray*, the *Post* case concerning the Iranians and the *Reporter's Committee* case concerning the Medico crime family, it seems a pattern has emerged in which efforts to hold federal agency activities up to public scrutiny have been rejected by the Court. This apparent march backward from *Rose* is clearly evident in the most recent case decided by the Supreme Court.

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[141] *Id.*

[142] 456 U.S. 595 (1982).

[143] *Id.* at 547.

[144] 489 U.S. at 755.

[145] 425 U.S. at 361.

Dept. of Defense v. FLRA (1994)

The consequences of the Court's narrow interpretation of the public interest in disclosure -- along with a persuasive argument against the Court's point of view -- are evident in *U.S. Dept. of Defense v. Federal Labor Relations Authority (FLRA)*.[146] In *FLRA*, the Court held that releasing the home addresses of government employees to union organizers would be a clearly unwarranted invasion of privacy under Exemption 6, because the information does not reveal the operations of the government.

The controversy in the case arose when two unions[147] asked the Army, Navy and Air Force to release the names and home addresses of agency employees in the bargaining units represented by the unions. The unions sought the information in order to communicate with potential members. The agencies disclosed the names and work stations but refused to release home addresses.[148] The unions filed unfair labor practices charges, and the Federal Labor Relation Authority consequently ordered the agencies to release the information. After applying the balancing test used to resolve Exemption 6 disputes, the U.S. Court of Appeals for the Fifth Circuit concluded that the home addresses should be disclosed because the public interest in collective bargaining outweighs the interest of federal employees keeping their home addresses private. The Fifth Circuit held that advancing the public interest of collective bargaining, "would not constitute a clearly unwarranted invasion of privacy."[149]

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[146] 114 S.Ct. 1006 (1994).

[147] Local 1657 of United Food and Commercial Workers Union represents a bargaining unit composed of employees of the Navy CBC Exchange in Gulfport, Miss. Local 1345 of American Federation of Government Employees, AFL-CIO, represents a worldwide bargaining unit composed of employees of the Army and Air Force Exchange.

[148] 114 S.Ct. at 1010.

However, on appeal, the Supreme Court reversed, holding that the disclosure of home addresses would constitute a clearly unwarranted invasion of privacy. Justice Clarence Thomas, who wrote the opinion for a unanimous Court, concluded that the individual privacy interest that would be protected by nondisclosure is significant.[150] He asserted that the privacy interest of withholding the home addresses of bargaining unit employees substantially outweighs the FOIA's public interest in disclosure.[151]

The FLRA opinion turns entirely on the precedent established in *Reporters Committee*: Information that does not directly reveal governmental operations or performance is an unwarranted invasion of privacy because the information falls "outside the ambit of the public interest that the FOIA was enacted to serve."[152] In his ruling, Thomas echoed the Court's sentiment as expressed by the Court in *Reporters Committee* -- information contained in the home addresses of agency employees does not shed any light on how government operates. Thomas wrote that the "only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the '*core purpose* of the FOIA"(emphasis added).[153] Thomas then defined the Act's "core purpose," citing *Reporters Committee*, as the disclosure of information that "contributes significantly to the public understanding of the operation or activities of government."[154]

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[149] *Id.* at 1016.

[150] *Id.*

[151] *Id.*

[152] 489 U.S. at 775.

In a concurring opinion, Justice Ruth Bader Ginsburg noted that she had no choice but to join the majority judgment in *FLRA*, in light of the precedent set in *Reporters Committee*. However, she strongly disagreed with the *Reporters Committee* opinion, characterizing the ruling as a "restrictive definition of the 'public interest in disclosure.'"[155] Ginsburg argued that the precedent on which the decision was based -- and which she was bound to follow -- "changed the FOIA calculus that underlies ... prodisclosure decisions."[156]

Ginsburg said the "core purpose" argument advanced by the Court in *Reporters Committee* cannot be found anywhere in the FOIA's language.[157] Ginsburg argued forcefully that an FOIA requester is not required to show that disclosure would serve any public purpose, "let alone a 'core purpose' of 'open[ing] agency action to the light of public scrutiny' or advancing 'public understanding of the operations or activities of the government.'"[158] To buttress her argument, she pointed out that in *Dept. of Justice v. Tax Analysts*,[159] the Supreme Court required disclosure of Department of Justice compilations of district court tax decisions to the publishers of a weekly magazine. "That disclosure," Ginsburg wrote, "did not notably 'add to public knowledge of Government operations.'"[160]

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[153] 114 S.Ct. at 1012.

[154] *Id. citing* 489 U.S. at 775.

[155] *Id.* at 1017.

[156] *Id.*

[157] *Id.* at 1019.

Justice Ginsburg also noted that the Court opinion in *FLRA* would not have comported with the statutory language of the FOIA before *Reporters Committee*. Ginsburg wrote:

> It is fully consistent with this statutory language to judge an invasion of personal privacy "warranted," courts held pre-*Reporters Committee*, even if the disclosure is unrelated to informing citizens about government operations. Courts, on the issue before us, found disclosure in order because the information was deemed specifically identified by Congress in the Labor Statute -- the interest in promoting federal-sector labor bargaining.[161]

In sum, Ginsburg rejected the narrow reading of the public interest standard in *Reporters Committee*, suggesting that the FOIA's plain meaning and congressional intent represent a broader vision -- that the public is entitled to more government-held information than merely that information which reveals how government operates or performs its duties. Moreover, she argued that the public interest in strengthening federal unions has been endorsed by Congress and enforced by the courts.[162]

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[158] *Id.* at 1018.

[159] 492 U.S. 136 (1989).

[160] 114 S.Ct. at 1019, *citing* 492 U.S. at 156-157.

[161] *Id.*

CONCLUSION

It appears that the Supreme Court's narrow interpretation of the public interest in disclosure has reshaped the boundaries established by Congress for the FOIA. As this analysis seeks to show, Court opinions have restricted public access to vital government information. For example, the Court upheld the government's refusal to disclose information that would have advanced the important public interest of effective collective bargaining for federal employees, as shown in Justice Ginsburg's concurrence in *FLRA*. The *FLRA* case illustrates the sharp contrast between the Supreme Court's narrow vision of the public interest in disclosure and a broader vision, which is what Congress intended, what *Rose* held and what Ginsburg articulated.

In other cases, such as *Washington Post*, *Abramson* and *Reporters Committee*, the Court has upheld decisions that have restricted the news gathering abilities of journalists in what seems to be a backward march that began after *Rose*. In all three cases, questionable government activities were shielded from the public. In the *Post* case, the newspaper raised the legitimate question of why two top officials of a government hostile to the

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[162] "As this court has recognized, in enacting the Labor Statute 'Congress unquestionably intended to strengthen the position of federal unions.'" *Id.* at 1018, Ginsburg *citing* Bureau of Alcohol, Tobacco, and Firearms v. FLRA, 464 U.S. 89, 107.

United States were allowed to travel with U.S. passports. In *Abramson*, the Courts protected president Nixon's abuse of FBI law enforcement powers to gather intelligence on administration critics. Finally, *Reporters Committee* blocked the press from gathering information on a reputed crime figure who allegedly obtained defense contracts for his company, in exchange for political contributions to a Congressman. These examples make it abundantly clear why the statutory right to know needs to be protected.

The right to know is relatively young. It is only in the last generation or so that Congress and the courts have begun to craft the laws recognizing the need for citizens in a democracy to gain access to government-held information. As the law continues to evolve, the judiciary would serve the nation's democratic interests if the courts were to reverse the current trend and march forward in keeping with the admonition of Harold L. Cross, whose steadfast advocacy for open government was a guiding star in the creation of the FOIA: "Freedom of information is the very foundation for all those freedoms that the First Amendment of our Constitution was intended to guarantee."[163]

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[163] See Cross, *supra* note 25, at xiii-xiv.

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In Self Defense: How the Government Uses National Security Reasons to Withhold Information Under the FOIA

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In Self Defense: How the Government Uses National Security Reasons To Withhold Information Under the FOIA

(Abstract)

The American government's need for confidentiality and secrecy in the areas of international relations and defense often conflicts with the democratic principles of an open society. While secrecy is necessary to conduct foreign affairs and devise national security policy, it also stifles the democratic process that helps keep citizens informed about what the government is doing.

The purpose of this paper is to focus on court opinions in which the government cited national security as the reason to reject requests for disclosure under the Freedom of Information Act (FOIA). The principal question posed in this analysis asks: Have the courts exceeded the plain meaning and legislative intent of the FOIA in their opinions regarding the national security exceptions?

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INTRODUCTION

The American government's need for confidentiality and secrecy in the areas of international relations and defense often conflicts with the democratic principles of an open society.[1] While secrecy is necessary to conduct foreign affairs and devise national security policy, it also stifles the democratic process that helps keep citizens informed about what the government is doing.[2] In a democracy, citizens can hold government accountable for what officials do and remove them from office when their policies do not meet with public approval. However, when government shields official actions from public knowledge and review, such accountability is impossible.[3] As one commentator notes: "Citizens can scarcely influence decisions they know nothing about. Where secrecy reigns, government officials are in a position to rule at virtually their own discretion."[4]

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[1] *See* The Freedom of Information Act, 5 U.S.C. Sec. 552 and The National Security Act, 50 U.S.C. Sec. 403(d)(3).

[2] U.S. Dept. of the Air Force v. Rose, 425 U.S. 352 (1976). *See also* Harold Edgar and Benno C. Schmidt, Jr., Curtiss-Wright Comes Home: Executive Power and National Security Secrecy, 21 Harv. C.R.-C.L. L. Rev. 349, 352-53 (1986).

[3] Francis E. Rourke, The United States, in Government Secrecy in Democracies 119, Itzhak Galnoor, ed., 1977.

[4] *Id.*

Nonetheless, secrecy is inherently a key to successful intelligence operations and has a long history in the American experience.[5] In 1777, for example, George Washington wrote about the need for secrecy in intelligence gathering:

> The necessity of procuring good intelligence is apparent and need not be further urged. All that remains for me to add is that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated.[6]

To resolve this conflict between open government and national security in modern times, Congress[7] and the courts[8] have sought to balance the benefits of an informed public with the government's need for an effective intelligence service. The purpose of this paper is to examine some Supreme Court and lower federal court opinions dealing with the conflict between the national security interest and the public interest in disclosure as expressed in the Freedom of Information Act (FOIA or the Act).[9] This analysis seeks to determine whether the courts have fairly balanced the governmental interests of withholding information against the social value of open government. The principal question posed in this analysis asks: Have the courts exceeded the plain meaning[10] and legislative intent of the Freedom of Information Act in their opinions regarding the national security exceptions?[11] A corollary question flows directly from this query: What, indeed, was the congressional intent for the FOIA and the national security exemptions?

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[5] CIA v. Sims, 471 U.S. 159, 172 n. 16 (1985).

[6] *Id. citing* 8 Writings of George Washington 478-79 (J. Fitzpatrick, ed., 1933)(letter from George Washington to Col. Elias Dayton, July 26, 1777).

[7] 5 U.S.C. Sec. 552(b)(1) and Sec. 552(b)(3).

[8] *See, e.g.,* Minier v. CIA, 88 F.3d 796 (9th Cir. 1996); Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993); Sullivan v. CIA, 992 F.2d 1249 (1st Cir. 1993); Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992); Knight v. CIA, 872 F.2d 660 (5th Cir. 1989); Fitzgibbon v. CIA, 911 F. 2d 755 (D.C. Cir. 1990); U.S. Student Assn. v. CIA, 620 F.Supp. (D.D.C. 1985).

[9] The national security interests are covered in the FOIA under two of its exemptions, Exemption 1 and Exemption 3. 5 U.S.C. Sec. 552(b)(1) and Sec. 552(b)(3).

In an effort to answer these questions, this paper examines the Freedom of Information Act along with several court cases in which the government refused to disclose information on grounds of national security. Section one discusses the historic roots of the FOIA. Section two examines the legislative intent of Congress in crafting the FOIA. The paper examines the congressional history of the national security exceptions in the third section. Finally, the last section analyzes several cases that illustrate how the courts permit the government to withhold information for reasons of national security. In its conclusion, this paper strongly suggests that the judiciary has allowed federal agencies considerable leeway to use the national security exceptions to withhold important information that could serve the public interest if disclosed.

I. HISTORIC ROOTS OF THE FOIA

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[10] Plain meaning refers to a statute's structure and actual language, i.e., "the apparent meaning of the statutory text." William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 625 (1990).

[11] *See supra* note 9.

The Freedom of Information Act is potentially one of the most valuable tools of inquiry available to journalists and others who want to know what the federal government is doing.[12] Government agencies collect vast amounts of information that can serve the public interest if disclosed. For example, journalists and others have used the law to learn why the Hubble Space Telescope mirror failed,[13] to reveal FBI harassment of Dr. Martin Luther King, Jr.[14] and to document the CIA's use of unwitting test subjects in LSD and mind-control experiments that took place in American universities.

The FOIA does not apply to state or local governments. The Act requires that federal agencies provide any person access to all records that do not fall under any one of nine exemptions.[16] The exemptions were created to balance the public interest in this statutory "right to know" against the government's needs to

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[12] *See* Amy E. Rees, Recent Developments Regarding the Freedom of Information Act: "Prologue to a Farce or a Tragedy; or, Perhaps Both," 44 Duke L.J. 1183, (1995); James A. Goldston, Jennifer M. Granholm, Robert J. Robinson, A Nation Less Secure: Diminished Public Access to Information, 21 Harv. C.R.-C.L. L. Rev. 408, (1986); Mark Jordan, Freedom of Information Act: CIA's Right to Nondisclosure Broadened by Liberal Definition of Intelligence Source, 25 Wash. L. Rev. 586, (1986); Michael H. Hughes, Note: CIA v. Sims -- Supreme Court Deference to Agency Interpretation of FOIA Exemption 3, 35 Cath. U. L. Rev. 279, (1985).

[13] *Id.*

[14] Kent R. Middleton and Bill F. Chamberlin, The Law of Public Communication 456 (1994).

[15] 471 U.S. 159 (1985).

[16] Briefly stated, the FOIA does not apply to matters that fall under the categories of (1) classified information and national security, (2) internal agency personnel information, (3) information exempted by statutes, (4) trade secrets and other confidential business information, (5) agency memoranda, (6) disclosures that invade personal privacy, (7) law enforcement investigatory records, (8) reports from regulated

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keep some information secret to function effectively.[17] Mainly, the exemptions serve to protect the privacy of individuals, the proprietary interests of businesses and corporations and to allow the government to keep confidential certain information that deals with national security and foreign policy.[18] The Act creates a judicially enforceable general presumption that favors disclosure of government-held information to the public.[19]

Before 1966, the press and general public had no legal recourse when they were denied access to government information. The movement to create this legal right has its social and political roots in events that began two decades before the Act was approved. America's use of the atom bomb to bring World War II to a close created tremendous interest among the press and public for information about this awesome new technology. It also prompted concerns among government officials who said national security was threatened by newspaper and magazine accounts of military readiness in the dawning era of atomic energy.[20]

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financial institutions and (9) geological and geophysical information. 5 U.S.C. Sec. 552(b)(1-9).

[17] S. Rept. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* Freedom of Information Act Source Book: Legislative Materials, Cases, Articles (1974), at 38, hereinafter, The Source Book. The Source Book of the Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary is a primary source for the legislative history of the FOIA.

[18] *Id.*

[19] 425 U.S. at 373. *See also* S. Rep. 813, 89th Cong. 1st Sess. (1965), *reprinted in* The Source Book, at 38.

[20] *See* Kathleen L. Endres, National Security Benchmark: Truman, Executive Order 10,290, and the Press, in Journalism Quarterly, Vol. 67, No. 4 (winter 1990).

In an attempt to settle this conflict, Congress passed the Administrative Procedure Act (APA) in 1946,[21] ostensibly to provide for access to "matters of official record." However, loopholes in the APA soon were being exploited by government agencies to restrict access to records, and the law came to be regarded as more of a withholding statute than a disclosure statute.[22] The legislation's standards were vague and easily subject to anti-disclosure interpretation,[23] thus justifying the withholding of any information "requiring secrecy in the public interest."[24] Moreover, under the APA, requesters of information were required to be "properly and directly concerned" with the information sought.[25] This phrase allowed agencies to deny access to persons requesting information if the information did not pertain specifically to the requesters themselves. Critics of the APA were also troubled because the law failed to provide a judicial remedy for confronting agencies that wrongfully withheld information. This allowed any arbitrary and capricious agency decisions to go unchallenged.[26]

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[21] 5 U.S.C. Sec. 1002 (1946).

[22] A 1965 Senate report on the proposed FOIA legislation described the APA as "full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities. ..." S.Rep. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* The Source Book, at 38. A 1966 House report noted that "improper denials (occurred) again and again" under the APA. H. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* The Source Book, at 26.

[23] *Id.*

[24] 5 U.S.C. Sec. 1002 (1946).

[25] *Id.*

As a result, federal agencies commonly abused the APA to justify withholding information.[27] Shortly after the APA was approved by Congress, federal regulatory agencies began almost automatically to withhold the names and salaries of federal employees.[28] In 1959, the Postmaster General declared that the public was not "properly and directly concerned" in knowing the names and salaries of postal employees.[29] In 1961, the Secretary of the Navy ruled that Navy telephone directories "fall in the category of information relating to the internal management of the Navy," and he cited the APA as the authority for his decision.[30] And in 1962, the National Science Foundation concluded it would not be "in the national interest" to disclose cost estimates submitted by unsuccessful contractors who bid on a multimillion-dollar deep sea study. Apparently, the firm that won the contract was not the lowest bidder.[31]

The rise of government secrecy in the post World War II era has been traced by some commentators to events in 1951.[32] By the fall

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[26] "For more than 10 years, through the administration of both political parties, case after case of improper withholding based upon (the APA) has been documented. The Administrative Procedure Act provides no adequate remedy to members of the public to force disclosures in such cases." H. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* The Source Book, at 26.

[27] "Improper denials occur again and again. For more than 10 years, through the administrations of both political parties, case after case of improper withholding based upon 5 U.S.C. 1002 (The Administrative Procedures Act) has been documented." *Id.*

[28] *Id.* at 27.

[29] *Id.*

[30] *Id.* at 26.

[31] *Id.*

[32] Endres, *supra* note 20, at 1072.

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of that year, new developments were capturing the attention of newspaper readers and the government; Communist governments were being formed in Europe and the conflict in Korea was heating up. It is against this backdrop that a significant event took place that increased government secrecy. On Sept. 24, 1951, President Harry Truman issued an unprecedented Executive Order, which extended for the first time a national security classification system that covered not only military agencies but also nonmilitary federal agencies.[33] This order meant that nonmilitary federal agencies were given the authority to withhold government information by classifying material as vital to national security. Truman believed that newspaper stories on military readiness, often accompanied by photos and maps, endangered U.S. national security as the specter of Communism loomed over Europe.[34] After World War II, for example, Fortune Magazine published an article accompanied by a map locating atomic energy research facilities.[35]

Reaction to the Truman order from the news media was swift and angry. For example, on Sept. 25, 1951, CBS radio news broadcaster Edward R. Murrow told an American audience listening to his regular newscast, *Edward R. Murrow With the News*, that Truman's order "makes possible -- indeed invites -- the extension of secrecy into vast areas where, by no stretch of the imagination would legitimate security interests be involved. Loss of freedom and the suppression of information generally come gradually. ... (I)f those who receive information about our government do not protest, ... we will have lost -- without battle -- something we have regarded as rather important.[36]

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[33] *Id.* citing Executive Order 10290 (1951).

[34] *Id.* Truman's executive order is significant because it granted classification authority to nonmilitary agencies involved in national security matters. However, it was President Franklin D. Roosevelt who issued in 1940 the first executive order that authorized government officials to classify military and naval information. Previously, classification of information was left to military regulation. *See* Exec. Order No. 8381, 3 C.F.R. 634 (1938-1943). *See* Harold C. Relyea, The Presidency and the People's Right to Know, The Presidency and Information Policy I, 16-18 (H. Relyea, ed. 1981).

[35] Endres, *supra* note 20, at 1071.

Two days later, the *Wall Street Journal* followed Murrow's lead in a strongly worded editorial that declared: "A free government lives on the freedom of the people to know what their government is doing. There are risks in this, of course, but they are not near so great as the risk we run if government officers are to be free when they choose to deprive the people of the freedom to know what they are doing."[37] And Sigma Delta Chi, the Society of Professional Journalists, said the order's lack of an appeals procedure makes it possible for an agency official to "draw a curtain of secrecy over information to which our citizens are entitled."[38]

As a result of Truman's order, the classification of documents became more commonplace and went well beyond military secrets, critics asserted. In 1953, Harold L. Cross, a First Amendment scholar and the attorney for the *New York Herald-Tribune*, noted that "there has been a heavy increase of secrecy in several fields."[39] He said documents and records were routinely withheld by government officials, "acting in the exercise of broad, practically unrestrained powers of discretionary character."[40] Cross described agency records as "quasi-confidential, privileged communications, commonly beyond the reach of the public, press or courts."[41]

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[36] A.M. Sperber, Murrow: His Life and Times (Freundlich Books, 1986), at 360.

[37] Wall Street Journal, at 6, Sept. 27, 1951.

Amid this conflict between the press and the government, a movement committed to open government and access to government-held information began to take shape. The movement was sparked by a collaboration that began in 1955 between newspaper lawyer Cross and a reform-minded Congressman from Sacramento, California, John E. Moss. Cross and Moss won the support of the newspaper industry,[42] professional journalists, government reform groups and organizations such as the American Civil Liberties Union, the American Bar Association and some academic groups.[43] Their efforts started with moves to revise the flawed Administrative Procedures

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[38] George A. Brandenburg, Sigma Delta Chi Opposes Security Rule, Editor & Publisher, Nov. 24, 1951, at 12.

[39] Harold L. Cross, The People's Right to Know (New York: Columbia University Press, 1953), at 9.

[40] *Id.* at 198.

[41] *Id.*

[42] Echoing widespread support of newspapers across the nation, a June 15, 1966 editorial in the Cincinnati Enquirer stated: "(T)he fact of the matter is that the cloak of secrecy has been stretched to conceal more and more governmental activities and procedures from public view. Many of these activities and procedures are wholly unrelated to the nation's security or to individual Americans' legitimate right to privacy." Also, the Los Angeles Times reported on June 12, 1966 that the proposed FOIA legislation was regarded by many supporters as a "new Magna Carta."

[43] Itzhak Galnoor, What Do We Know About Government Secrecy? *See supra* note 3, at 290.

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Act[44] and culminated with the passage of the Freedom of Information Act in 1966.

Although the FOIA eventually won wide support in Congress, and it is often used successfully as a tool for finding out what government is doing, the Act is not without critics. Critics contend the Act burdens agencies with information requests that have nothing to do with the Act's goals.[45] They also say the Act allows private individuals and corporations access to government information that is of personal or financial benefit only to the requester. "The necessary training for any big-time litigating lawyer now includes not only the cross-examination of witnesses, but (also) use of the Freedom of Information Act," declared Antonin Scalia before he was appointed to the Supreme Court.[46] "In short, it is a far cry from John Q. Public finding out how his government works."[47] Journalists also argue that the FOIA is often ineffective. Reporters say agencies interpret the exemptions broadly to withhold information and use procedural ploys to block or delay access inquiries.[48]

II. FOIA LEGISLATIVE INTENT

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[44] Moss served as head of the Government Information Subcommittee of the House Committee on Government Operations. Between 1955 and 1960, Moss, a Democrat who opposed the Republican Administration's withholding policies, held 173 hearings and investigations and issued 17 volumes of hearings transcripts and 14 volumes of reports. James T. O'Reilly, Federal Information Disclosure -- Procedures, Forms and the Law (New York: Shepard's/McGraw-Hill, Inc., 1994), at 2.5.

[45] *See, e.g.*, Antonin Scalia, The Freedom of Information Act Has No Clothes, in Regulation, March/April 1982, at 16.

[46] *Id.*

[47] *Id.*

An examination of the Act's legislative intent is important for two reasons to understand how the courts interpret the national security exemptions. First, judges routinely interpret the FOIA's legislative intent before they rule on challenges to any of the nine exemptions.[49] The second reason is more complex. Under the 1974 FOIA amendment to Exemption 1, the courts have the right to look at the contested records or documents *in camera* (in their chambers) for a *de novo* review.[50] Before 1974, not even judges were allowed to review documents that federal agencies refused to disclose under the national security exemption. Thus, the legislative history of the 1974 amendments is important because it shows why Congress believed it is necessary for the judiciary to provide a check on the executive branch, which determines the criteria for classification under the national security exemption.[51]

The congressional history of the FOIA represents a clear record of its legislative intent. For example, a 1965 Senate

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[48] Middleton, *supra* note 14, at 456.

[49] For examples of how courts discuss and apply legislative intent, *see e.g.* Hayden v. National Security Agency, 608 F.2d 1381, 1390; Weissman v. CIA, 565 F.2d 692, 697; Sims v. CIA, 471 U.S. 159, 170.

[50] Under the procedure of *de novo* review, judges have the authority to conduct their own examination of documents to determine whether the CIA complied with criteria for classification, which are determined by Executive Order. 5 U.S.C. Sec. 552(a)(4)(B).

[51] 5 U.S.C. Sec. 552(b)(1). *See* H.R. Rep. No. 1380, 93d Cong., 2d Sess. 12 (1974); S. Rep. No. 1200, 93d Cong. 2d Sess. 12 (1974), *reprinted in* 1974 U.S. Cong. & Ad. News 6290. *See* Pub. L. No. 93-502, 1-3, 88 Stat. 1561, Nov. 21, 1974. *See also* Environmental Protection Agency v. Mink, 410 U.S. 73 (1973).

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report reflected that an information policy of full disclosure is the engine that drives the Act:

> Today the very vastness of our Government and its myriad of agencies makes it difficult for the electorate to obtain that 'popular information' of which Madison spoke.[52] But it is only when one further considers the hundreds of departments, branches, and agencies which are not directly responsible to the people, that one begins to understand the great importance of having an information policy of full disclosure.[53]

Legislators buttressed their arguments for creating a legally enforceable right to access by noting its historic roots in American tradition. They pointed out that the Framers of the Constitution, in creating a democratic system of self-government, recognized the crucial role of public access to information. The works of James Madison[54] and Thomas Jefferson were often quoted by legislators in House and Senate committee reports and Congressional hearings.

The perspective of legislators who crafted the Act was also echoed by President Lyndon B. Johnson when he signed the FOIA

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[52] Madison wrote: "A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Berry (Aug. 4, 1822), *reprinted in* 9 The Writings of James Madison 103 (Gaillard A. Hunt ed., 1910).

FOIA legislatures and commentaries on the Act frequently cite this famous quotation by Madison to support a position that access has historic roots traced to the Framers. The philosophy expressed in the quotation can be interpreted in this regard, but it is important to note that the remark was actually made in the context of expanding a public education system in Kentucky. *See* Paul H. Gates, Jr. And Bill F. Chamberlin, Madison Misinterpreted: Historical Presentism Skews Scholarship, in American Journalism, Vol. 12, No. 1, 38-47 (1996).

[53] S. Rep. 813, 89th Cong. 1st Sess. (1965), *reprinted in* The Source Book, at 38.

[54] *See supra* note 52.

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into law on July 4, 1966: "This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtain of secrecy around decisions which can be revealed without injury to the public interest."[55]

Despite the FOIA's clear legislative intent, wide congressional support and its endorsement by key figures in the Administration,[56] the law's first few years were not as successful as hoped.[57] There was a general reluctance by agencies to comply with the law, rendering it "a relatively toothless beast, sometimes kicked about shamelessly by the agencies."[58] Federal agencies interpreted the exemptions broadly to justify withholding documents. Officials also used various ploys to discourage use of the Act, including high fees for copying documents, long delays and claims that they could not find the documents requested.[59] In great part, this state of affairs was the result of sometimes vague or even poor draftsmanship of the FOIA. Criticism of the Act ranged from the subtle ("hardly ...

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[55] Public Papers of the Presidents, Lyndon B. Johnson, 1966 II, at 699. Also *cited in* The Source Book, at 1.

[56] For example, former Attorney General Ramsey Clark, who served under President Johnson, characterized the FOIA's policy of full disclosure as the "transcendent goal" of the Act. Foreward to the Attorney General's Memorandum on the Public Information Section of the Administrative Procedures Act (1967).

[57] *See* Letter to Sen. James O. Eastland, chairman, Senate Committee on the Judiciary, from Sen. Edward M. Kennedy, The Source Book, at III.

[58] Scalia, *supra* note 45, at 15.

[59] Allan Robert Adler, ed., Litigation Under the Federal Open Government Laws (American Civil Liberties Union Foundation, 19th ed., 1995), at 8.

the apogee of legislative draftsmanship") to the blunt ("primitive and ineffective").[60]

Recognizing, in the words of Senator Edward M. Kennedy, that "the doors of government would (not) be opened to the public,"[61] Congress acted to clarify and strengthen the law through a series of amendments. By early 1973 -- amid concerns about government secrecy as details of the Watergate scandal surfaced -- bills to put teeth in the FOIA were introduced in the House and Senate.[62]

- Agencies were required to respond to information requests within 10 days or face a lawsuit.[63]
- Federal district judges were permitted *in camera* review of top secret classified information.[64]
- Search and copying fees were made uniform among the agencies.[65]
- Requested records need only to be described in a way sufficient to allow an agency to find the category of the documents requested.[66]

Congress passed the 1974 amendments twice by overwhelming majorities, overriding President Gerald Ford's veto the second time around.[67] The 1974 amendments sharpened the FOIA, reshaping the law as it stands today. The FOIA applies to records held by agencies in the executive branch of federal government, including the Executive Office of the President, and independent regulatory agencies, such as the Federal Communications Commission, the Environmental Protection Agency and the Securities and Exchange Commission.[68] The FOIA does not apply to records held by state governments, Congress, the courts, municipal corporations or private citizens. Nor does it apply to the personal staff of the President and some executive-branch agencies whose sole function is to advise the President, such as the Council of Economic Advisors.[69] To help ensure access, the law requires that federal agencies publish in the Federal Register their organization plans and regulations along with procedures by which the public may obtain information.

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[60] O'Reilly, *supra* note 44, at 3.2.

[61] *See supra* note 57.

[62] Robert P. Deyling, Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act., 37 Vill. L. Rev. 67 (1992), at 74-75.

[63] 5 U.S.C. Sec. 552(a)(6)(A)(i).

[64] 5 U.S.C. Sec. 552(a)(4)(B); H.R. Rep. No. 1380, 93d Cong., 2d Sess., 11 (1974).

[65] *Id.* at 7.

[66] *Id.*

III. THE FOIA AND NATIONAL SECURITY

The government's practical necessities to enshroud information concerning national defense and foreign relations poses special problems in a democratic society.[71] The resolution

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[67] The first vote was 383 to 8 in the House and 64 to 17 in the Senate; Congress overrode Ford's veto 371 to 31 in the House and 65 to 27 in the Senate.

[68] 5 U.S.C. Sec. 552(f).

[69] S. Conf. Rep. No. 1200, 93d Cong. 2d Sess. 15 (1974). *See also e.g.* Rushforth v. Council of Economic Advisors, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985).

[70] 5 U.S.C. Sec. 552(a)(3),(4)(A).

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of this conflict between governmental secrecy and open government rests in balancing the benefits of an informed public with the national security need for an effective intelligence service. To help achieve this balance Congress created the national security exemption in the Freedom of Information Act.[72]

Exemption 1, the national security exemption, states that the provisions of the FOIA do not apply to matters that are "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact (B) properly classified pursuant to such Executive Order."[73] Congress crafted the exemption's current language in a 1974 amendment to revise its original language. The 1966 version of the national security exemption said only that the FOIA did not apply to maters "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy."[74]

The 1974 Amendment to Exemption 1

Before 1974, information classified as "confidential," "secret" or "top secret" could not have been examined even by judges to determine whether the material was properly classified.[75] In a 1973 opinion, for example, the Supreme Court

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[71] 471 U.S. at 174-77.

[72] 5 U.S.C. 552(b)(1).

[73] 5 U.S.C. Sec. 552(b)(1) (1994).

[74] 5 U.S.C. Sec. 552(b)(1) (1966).

ruled in *Environmental Protection Agency v. Mink*[76] that once the President had determined by Executive Order that certain information was to be classified, the information was exempt from judicial review.[77]

In this case, the Court rejected a request by U.S. Representative Patsy Mink to obtain classified documents used by President Richard Nixon to decide whether to conduct a nuclear test off the coast of Alaska. The government refused to disclose the report, contending it was classified "Top Secret," and cited Exemption 1 as its authority to withhold the information.[78] In a 7-to-2 vote, the Court construed Exemption 1 broadly and ruled in favor of nondisclosure, ruling that the mere fact of classification was sufficient to justify withholding the documents from the public.[79] The Court held that the national security exemption neither permitted nor compelled *in camera* (in chambers) inspection by judges to sort out those documents that contained no secrets.[80] All that the government was required to establish is that the document (1) was indeed classified and (2) fell within the categories protected from disclosure by Executive Order.[81]

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[75] *Id.*

[76] 410 U.S. 73 (1973).

[77] *Id.* at 84.

[78] *Id.* at 75.

[79] *Id.* at 84.

[80] *Id.* at 81.

[81] *Id.*

In a concurring opinion, Justice Potter Stewart agreed, acknowledging that the majority opinion was based on a correct interpretation of Exemption 1's language. However, Stewart was critical with the exemption as it was written, prompting the caustic comment that the national security exemption "provides no means to question an executive decision to stamp a document, 'secret,' however cynical, myopic, or even corrupt that decision may have been."[82]

Congress amended the Exemption 1 in 1974 in response to the *Mink* opinion because legislators believed that the Court's ruling conflicted with the general philosophy of full disclosure evinced in the FOIA.[83] Exemption 1 was amended in two ways:[84] First, it modified the national security exemption to clarify that the court had the power to look beyond the mere fact that material had been classified and could consider whether classification was proper. Second, the amendment provided that the court had the power to conduct *in camera* review of the information that the government contended was classified. However, judges cannot challenge the classification standards adopted by a President; they can determine only whether the information was properly classified according to those standards.[85]

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[82] *Id.* at 95.

[83] *See* H.R. Rep. No. 1380, 93d Cong., 2d Sess. 12 (1974); S. Rep. No. 1200, 93d Cong., 2d Sess. 12 (1974), *reprinted in* 1974 U.S. Cong. & Admin. News 6290. *See* Pub. L. 93-502, 1-3, 88 Stat. 1561, Nov. 21, 1974.

[84] Peter C. Hein, Business Information: Protection and Disclosure, The Freedom of Information Act and Related Laws 86 (1983).

[85] *Id.*

The Executive Order on Classified National Security Information establishes both substantive and procedural criteria for withholding national security information. Substantive criteria spell out what categories of information may be considered for classification. Some examples include military plans, programs for safeguarding nuclear materials or facilities, foreign relations activities and intelligence activities.[86] Procedural criteria specify the proper procedures for classifying national security information. For example, only specifically designated officials may classify information. Additionally, classified information must be marked to show the identity of the classification authority, the classification level and declassification instructions.[87]

Presidential Standards for Classification

Exemption 1 is the only FOIA exemption that allows the executive branch, rather than Congress, to determine the criteria for withholding information. Because the national security exemption is tied directly to Presidential standards for classification, it is important to note how these standards have varied since the 1974 amendments were adopted. President Jimmy Carter, for example, tended to support a presumption for disclosure. In 1978, he issued an Executive Order[88] that favored

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[86] Adler, *supra* note 59, at 30.

[87] *Id.* at 33.

[88] Exec. Order No. 12,065, 3 C.F.R. sec. 190 (1978).

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declassification if the public interest in disclosure outweighed damage to national security that "might be reasonably expected from disclosure."[89] In addition, all classified documents and materials were automatically declassified after six years.[90]

President Reagan departed sharply from President Carter's stance on classification and issued an Executive Order in 1982[91] that enlarged classification authority.[92] Under the Reagan Administration, the classification policy -- which the Bush Administration later followed -- prescribed more classification. In addition, agencies classifying information were not required, as they had been under Carter, to balance the need for security against the public's interest in disclosure.[93] Finally, the standard for deciding the "confidential" classification was relaxed from Carter's "identifiable damage to national security" to a reasonable expectation that damage would take place.[94]

President Bill Clinton's current Executive Order on Classified National Security Information[95] became effective Oct. 17, 1995, and replaced the previous Executive Order, which was issued by President Reagan on April 2, 1982.[96] It is too soon to tell how Clinton's Executive Order might affect future court decisions interpreting rules for disclosure under the FOIA. But after 30 years of experience with FOIA, the courts to date have allowed a broad meaning for national security interests and thus have restricted access to important information. For example, historian and legal scholar Dwight L. Teeter, Jr., noted in 1995[97] that:

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[89] Judith Pfeffer, "Executive Order 12356: An Analysis," in The Reporter's Handbook: An Investigator's Guide to Documents and Techniques 95 (1983).

[90] *Id.* at 96.

[91] Exec. Order No. 12356, 3 C.F.R., sec. 166 (1982).

[92] Pfeffer, *supra* note 89, at 95-97.

[93] *Id.* at 96-97.

[94] *Id.* at 95.

[95] Exec. Order No. 12958,, 3 C.F.R. 166 (1982 Comp), *reprinted as amended in* 5 U.S.C. Sec. 552.

- The CIA budget is never officially disclosed, though reports in *The New York Times* and in other publications estimated the annual budget for 1994 at $28 billion.

- The ultra-secretive National Security Agency, which oversees satellite intelligence activities, reportedly has a budget larger than the CIA's.

- The National Reconnaissance Office (NRO), an agency run jointly by the Pentagon and the CIA, had construction well under way on a $350 million spy satellite headquarters outside Washington, D.C., before Congress found out about it. The Senate Intelligence Committee did not know its size, location or cost, because the project was a state secret until 1992. This revelation prompted Senate Intelligence Committee member Howard Metzenbaun to say: "This project is a good example of what happens when ... the Government does business in the dark."[98]

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[96] Exec. Order No. 12356, 3 C.F.R. 66 (1982).

[97] Dwight L. Teeter, Jr., and Don R. Le Duc, Law of Mass Communications: Freedom and Control of Print and Broadcast Media 639 (1995).

[98] *Id., citing* Tim Weiner, New CIA Office Draws Heavy Fire, New York Times, Aug. 9, 1994, at A-1.

Exemption 3 and the National Security Act

In addition to Exemption 1, the national security exemption, American national security interests are covered under Exemption 3.[99] This exemption, known as the withholding-statutes exemption, allows Congress to make the secrecy decision instead of a federal agency. Congress created Exemption 3 to allow agencies to refuse Freedom of Information Act requests for information that is exempted by another statute, even though the information might not be exempted by any of the nine FOIA exemptions. This exemption thus resolves any conflicts that may arise when a FOIA requester seeks information that Congress has previously determined to be confidential.

Although Exemption 3 applies to records held by a wide variety of federal agencies, it is relevant to the present analysis because it is often used by the Central Intelligence Agency to justify withholding information under the FOIA.[100] The CIA frequently has used Exemption 3 to justify refusals to disclose CIA-held information[101] since 1985, when the Supreme

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[99] 5 U.S.C. Sec. 552(b)(3).

[100] Adler, *supra* note 59, at 66. It also applies to the Internal Revenue Service, the Census Bureau, the Federal Trade Commission, the Equal Employment Opportunity Commission and the Postal Service, which is why it is referred to as the "catch-all" exemption. It is often used along with Exemption 1, the national security exemption, when an agency, usually the CIA, withholds information for national security reasons.

[101] Minier v. CIA, 88 F.3d 796 (9th Cir. 1996); Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993); Sullivan v. CIA, 992 F.2d 1249 (1st Cir. 1993); Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992); Knight v. CIA, 872 F.2d 660 (5th Cir. 1989); Fitzgibbon v. CIA, 911 F. 2d 755 (D.C. Cir. 1990); U.S. Student Assn. v. CIA, 620 F.Supp. (D.D.C. 1985).

Court ruled[102] that the National Security Act of 1947[103] qualifies as a withholding statute.

The policy objectives behind the National Security Act of 1947 are in sharp contrast with the mandate for full disclosure that underlies the FOIA. Enacted after World War II, the National Security Act created the Central Intelligence Agency and authorized the agency to collect and evaluate intelligence related to national security.[104] The Act resulted from Congressional concern over the adequacy of American intelligence operations before the attack on Pearl Harbor and during the ensuing war.[105] Congress intended that the Act would improve the nation's ability to gather and analyze intelligence information in times of war and peace.[106]

A key provision of the National Security Act[107] gives the Director of Central Intelligence broad and unreviewable authority

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[102] 471 U.S. 159.

[103] 50 U.S.C. Sec. 403(d)(3) (1947).

[104] *Id.*

[105] A 1947 House report that accompanied the legislation for the National Security Act said the U.S. war effort "disclosed certain fundamental weaknesses in our security structure which should be remedied while their details are fresh in mind." The report pointed to this nation's "slow and costly mobilization" and "limited intelligence of the designs and capacities of our enemies" as convincing evidence that the United States "would be imperiled were we to ignore the costly lessons of the war and fail to recognize our national security structure so as to prevent the recurrence of these defects." H.R. Rep. No. 1051, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. code Cong. Serv. 1488-89. *See also* H.R. Rep. No. 961, 80th Cong., 1st Sess. 3-4 (1947), and S. Rep. No. 239, 80th Cong. 1st Sess. 2 (1947).

[106] "One of the characteristics of the present era is the need to maintain adequate security measures at all times, rather than only when hostilities threaten or have broken out." H.R. Rep. No. 1051, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. code Cong. Serv. 1488.

[107] Sec. 102(d)(3) of 50 U.S.C. Sec. 403(d)(3).

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to withhold from disclosure any information that, in his opinion, may jeopardize the national security.[108] Under this provision, the information need not be classified. Exemption 3 clearly "casts a much wider net"[109] than Exemption 1, whose requirements for withholding are based on specific criteria set forth by Presidential executive orders for classification.[110]

Some courts have recognized the government's "built-in incentive" for the kind of secrecy that has been legitimized in Exemption 1 and Exemption 3 -- it helps to conceal mistakes.[111] Most courts, however, have not challenged this tendency toward unnecessary secrecy when agencies raise the national security interest. Courts typically give automatic deference to officials who cite Exemption 1 as grounds to refuse to disclose information.[112] An analysis of key cases shows how the courts have broadly defined the boundaries of the FOIA when it comes to national security, which to the judiciary means national defense and the foreign relations of the United States.[113]

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[108] 471 U.S. at 191-92.

[109] United States Student Assn. v. CIA, 620 F.Supp. 565, 570 (D.D.C. 1985).

[110] 5 U.S.C. Sec. 552(b)(1) and Sec. 552(b)(3). *See also* 471 U.S. at 189-90.

[111] "Congress was certainly aware that agencies, left to themselves, have a built-in incentive to dispose of records relating to 'mistakes' or, less nefariously, just do not think about preserving 'information necessary to protect the legal and financial rights ... or persons directly affected by agency's activities.'" American Friends Service Committee v. Webster, 720 F.2d 29, 41 (D.C. Cir. 1983), *citing* 44 U.S.C. Sec. 3101.

[112] *See, e.g.*, Taylor v. U.S. Department of the Army, 684 F.2d 99, 111 (D.C. Cir. 1982) and Weissman v. CIA, 565 F.2d 692, 697 (D.C. Cir. 1977).

IV. CASE ANALYSES

An analysis of court FOIA rulings, in which judges have upheld agency decisions to withhold information for national security reasons, suggests that these cases typically fall into one of three categories. According to this model, these categories are called (A) The Government's Word, (B) The Nondenial Denial and (C) The Judicial Dead End.

A. The Government's Word

When it comes to Exemption 1, the national security exemption, courts have been reluctant to second-guess the government when it comes to classification of documents. The law states that a court *may* determine whether the documents were properly classified -- it does not say a court *must* rule on a dispute.[114] In general, when it comes to the national security exemption of the Freedom of Information Act, FOIA authority James T. O'Reilly suggests that FOIA requesters "will obtain fewer useful records when faced with the national security exemption ... than they will against claims of exemption under virtually any other of the nine exemptions."[115] A main reason for this kind of restricted access is that the courts defer nearly

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[113] 684 F.2d at 111.

[114] Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir. 1975).

[115] O'Reilly, *supra* 44, 11-1.

automatically to the judgment of military officials when it comes to issues that may pertain to national security.[115]

In practice, most courts will refuse even to examine the classified documents when a requester's application for disclosure has been rejected for reasons of national security. Judges have declared that courts lack the necessary expertise to make such a determination.[117] In other words, the court takes the government's word that the refusal to disclose the information was in keeping with the substantive and procedural criteria established by the President's Executive Order.[118] "Far more than any judges, (government and military officials) have the background for making classification and declassification decisions," the Court of Appeals for the Fourth Circuit ruled in *Alfred A. Knopf, Inc. v. Colby*,[119] a leading case on Exemption 1. Courts have echoed this view in subsequent cases.[120]

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[116] 684 F.2d at 111 and 565 F.2d at 697.

[117] 565 F.2d at 697.

[118] The Executive Order on Classified National Security Information establishes both substantive and procedural criteria for withholding national security information. Substantive criteria spell out what categories of information may be considered for classification. Procedural criteria specify the proper procedures for classifying national security information.

[119] 509 F.2d at 1370.

[120] "(F)ew judges have the skill or expertise to weigh the repercussions of disclosure of intelligence information." Weissman v. CIA, 565 F.2d 692, 697 (D.C. Cir. 1977).

"Congress intended reviewing courts to respect the expertise of an agency; for us to insist that the agency's rationale here is implausible would be to overstep the proper limits of the judicial role in FOIA review." Hayden v. National Security Agency, 608 F.2d 1381, 1388 (D.C. Cir. 1979).

See generally, Weinberger v. Catholic Action of Hawaii/Peace Project, 454 U.S. 139 (1981), in which the Supreme Court ruled 9-0 that great weight must be given to the claims of government and military officials who argue for a need for secrecy. In *Weinberger*, the Court allowed the Department of the Navy to get around the filing of an environmental

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Judges have shown they are especially unwilling to question affidavits by military officials, allowing "utmost deference"[121] to military arguments that documents have been properly classified. For example, in deciding *Taylor v. the U.S. Dept. of the Army*,[122] the Court of Appeals for the District of Columbia refused to review *in camera* documents sought by reporter Jack H. Taylor of the *Daily Oklahoman*. Taylor requested a compilation of all combat-unit readiness reports, and the district court ordered the Army to produce the documents because individual reports had been unclassified for [illegible] years. However, the Court of Appeals reversed the decision because affidavits by three generals declared that disclosure of the reports would result in "identifiable" damage to the national security. "In view of the knowledge, experience and positions held by the three (generals) regarding military secrets, military planning and national security, their affidavits were entitled to the utmost deference," the D.C. Circuit held.[123]

The courts have held that a summary judgment in favor of the government is warranted on the basis of affidavits when (1) the affidavits demonstrate in "reasonably specific detail" that (2) the information "logically falls" within the national security exemption and (3) the affidavits are not controverted by contrary evidence or (4) the affidavits are not undermined by "agency bad

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impact report for construction of a weapons storage area in Hawaii, because the document would have been open to inspection under the FOIA.

[121] 684 F.2d at 109.

[122] 684 F.2d 99.

[123] *Id.* at 109.

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faith."[124] Additionally, judges have justified their reliance on affidavits by saying they are simply too busy to consider every first exemption dispute. "*In camera* inspection in each FOIA case would create a staggering burden both for this court and the district court," the D.C. Circuit said.[125]

B. The Nondenial Denial

In some instances, judges do not have the option to review government-held information to determine whether the material qualifies for disclosure under the FOIA. This situation arises because courts have held that the CIA is permitted to respond to an FOIA request by saying the Agency can "neither confirm nor deny" the existence of a document for national security reasons.[126] Such a reply, known as the "Glomar response," was first accepted in 1976 when journalist Harriet Phillippi requested information on a research ship called the Hughes Glomar Explorer.[127]

In *Phillippi v. CIA*,[128] The D.C. Circuit upheld the CIA's refusal to confirm or deny that the agency had records on the vessel. The CIA spent more than $350 million in this joint project with the late Howard Hughes to raise an outmoded Russian submarine that sank about 750 miles northwest of Hawaii.[129] Hughes built a giant 36,000 ton floating platform to raise the vessel. The secret project, which ultimately raised part of the obsolete sub, was passed off to the public as a deep-sea mining expedition.[130] The courts also have upheld the "neither confirm nor deny" response concerning requests for records describing or authorizing CIA covert paramilitary operations directed at Nicaragua.[131]

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[124] 565 F.2d at 697. *See also* Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981), *citing* Baez v. U.S. Department of Justice, 647 F.2d 1328, 1335 (D.C. Circuit 1982).

[125] 565 F.2d at 697.

[126] Phillippi v. CIA, 546 F.2d 1009, 1012-13 (D.C. Cir. 1976).

[127] *Id.*

[128] 546 F.2d 1009 (D.C. Cir. 1976).

When an agency responds to a request for information by refusing to confirm or deny that the documents exist, the court must first treat the issue of whether the documents even exist as the request.[132] The courts require that the agency must provide an affidavit, explaining in as much detail as possible, the basis for its claim that it can be permitted to neither confirm nor deny existence of the requested records.[133] However, as we have seen with cases in "The Government's Word" category, courts give "utmost deference"[134] to affidavits by officials.

The CIA successfully used the "nondenial denial" to refuse disclosure as recently as Dec. 4, 1996. A New York federal judge held that the CIA properly invoked the "neither confirm nor deny" response to a request seeking information about the existence of a CIA station in the Dominican Republic in 1960.[135] The U.S. District Court for the Southern District of New York upheld the CIA argument, which asserted that "such a confirmation could cause a confrontation with the Dominican Republic or the disruption of foreign relations."[136]

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[129] 656 F.2d 725-27.

[130] *Id.* at 742, *citing* a 1976 Senate committee report.

[131] Peterzell v. Faurer, No. 85-2685 (D.D.C. July 11, 1986).

[132] Hudson River Sloop Clearwater v. U.S. Department of the Navy, 891 F.2d 414 (2d Cir. 1989). *See also* Adler, *supra* note 49, at 40.

[133] 546 F.2d at 1012-13.

In asking for the information from the CIA, the requester noted that the existence of the station was made public in a Senate committee report in 1975.[137] The requester simply wanted official CIA confirmation about the station's existence. Echoing the CIA position, the court concluded "countries are willing to tolerate the presence of CIA installations in their country only if the United States does not officially acknowledge that such stations exist. Thus, confirmation of the existence of such an installation, even by another branch of the federal government, is different from the CIA itself acknowledging the existence of the base."[138]

C. The Judicial Dead End

In the event that an agency confirms the existence of records and a judge decides to review the material *in camera*,

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[134] 684 F.2d at 109.

[135] Earth Pledge Foundation and Fundacion Cultural Dominica v. CIA, Civil Action No. 95 Civ. 0257 (JGK) (S.D.N.Y. 1996).

[136] *Id.*

[137] Sen. Frank Church headed the Select Committee to Study Government Operations with Respect to Intelligence Activities.

there are carefully prescribed statutory limits as to how much discretion a judge has when it comes to releasing information withheld under the Exemption 1 rationale.[139] According to the Congressionally established limits set out in Exemption 1 of the Freedom of Information Act,[140] a judge's role is limited to determining only whether the material was properly classified. In basing a decision upon an *in camera* review, judges do not have the authority to question the standards established by the executive branch for classification of records. Judges can decide only whether the information was properly classified according to those standards. If the proper classification procedures have been followed and the documents fall under Exemption 1, then the court must uphold an agency's decision to withhold information.

This procedure has been followed by most judges even in instances when the information sought is so dated that the documents can be likened more to historical records than intelligence records.[141] For example, in 1984 the Court of Appeals for the District of Columbia upheld the CIA's refusal to disclose information on alleged attempts by the United States to sneak guerrillas into Albania between 1945 and 1953.[142] In *Miller*

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[138] Civil Action No. 95 Civ. 0257 (JGK) (S.D.N.Y. 1996).

[139] 5 U.S.C. Sec. 552(b)(1).

[140] *Id.*

[141] There are perhaps as many as one billion classified documents, some going back to World War I, according to Steven Garfinkel, director of the Information Security Oversight Agency, the federal agency that administers the classification system. There are 325 million pages of classified documents in the National Archives alone. 1993 Report to the President, Information Security Oversight Office.

[142] Miller v. Casey, 730 F.2d 773 (D.C. Cir. 1984).

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v. *Casey,* a historian seeking this information for a book wanted to confirm unofficial reports that a joint espionage effort was conducted by the United States and Great Britain to infiltrate the Albanian Communist government with partisans. All the agents were either captured or killed. The CIA, in justifying its refusal to release the 30-year-old information, said disclosure and publicity might jeopardize future relations with Albania.

Courts also have upheld the government's refusal to disclose documents about the Cuban Missile Crisis and anti-Cuban CIA operations going back more than 30 years. These documents are believed to contain information about U.S. military and economic plans to bring down the Castro government.[143] In one case, *Maynard v. CIA,*[144] a district court judge ordered the government to release this kind of information to a FOIA requester, ruling that the CIA's "assertion that disclosure will 'reveal its sources and methods' in a matter now approximately 30 years old is without substance and is, indeed, the height of disingenuousness."[145] However, this decision by the U.S. District Court for the District of Maine was reversed by the U.S. Court of Appeals for the First Circuit in 1993.[146]

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[143] See *generally* Brenner v. United States Department of State, Civil Action No. 99-0034 (D.D.C. filed Jan. 7, 1988), *cited in* Robert P. Deyling, Judicial Deference and de Novo Review in Litigation Over National Security Information Under the Freedom of Information Act, 37 Vill. L. Rev. 76, 69 (1992).

[144] 986 F.2d 547 (1st Cir. 1993).

[145] *Id.* at 554.

[146] *Id.* at 556.

Although the limited discretion of the judiciary in Exemption 1 cases might be short-sighted when it comes to disclosing information of important historical interest, it is nonetheless prescribed by Congress. This judicial limit is part of a checking system that balances deference to the President's interests in maintaining secrecy with continued judicial and congressional oversight.[147] However, when it comes to Exemption 3, the so-called "catch-all" exemption,[148] the calculus is dramatically altered. As a result of a 1985 Supreme Court opinion in *CIA v. Sims*,[149] the CIA can use the National Security Act of 1947 to withhold any information -- including unclassified information -- at the discretion of the Director of Central Intelligence. This broad and unreviewable authority[150] to withhold information applies even to information that concerns outright wrongdoing by the CIA in covert activities directed at American citizens on U.S. soil.[151]

Such wrongdoing was the subject of *CIA v. Sims*,[152] a case that concerns a 1977 FOIA request for information that would disclose the identities of universities and researchers who took part in government-sponsored experiments in mind control from

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[147] 471 U.S. at 183.

[148] *See supra* note 100.

[149] 471 U.S. 159 (1985).

[150] *Id.* at 168-69.

[151] 471 U.S. 159.

[152] *Id.*

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1953 to 1965.[153] These experiments were conducted by 185 researchers in 80 institutions, including universities, research centers and similar facilities. Code named MKULTRA, the project was concerned with developing chemical, biological and radiological materials capable of use in operations to control human behavior.[154] Experiments included the surreptitious use of LSD and other drugs on unwitting test subjects, some of whom were lured into taking the drugs by prostitutes hired by the CIA. The experiments resulted in at least two documented deaths, possibilities of serious health problems for others and a government cover-up.[155] Information about these experiments leaked out and Senate hearings were conducted.[156] Afterward, a FOIA request for information about MKULTRA was filed by a public interest group headed by Ralph Nader.

The CIA refused to disclose the information and cited the National Security Act of 1947, which is permissible under Exemption 3,[157] to defend its refusal to release details of the project. Chief Justice Warren Burger, writing the unanimous opinion, upheld the government's justification for refusing to disclose information about the CIA: "(F)orced disclosure of the identities of its intelligence sources could well have a devastating impact in the Agency's ability to carry out its mission. ... If potentially valuable intelligence sources come to think that the Agency will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the Agency in the first place."[158]

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[153] *Id.* at 161-62.

[154] *Id.*

[155] *Id.*

[156] *See* Project MKULTRA: the CIA's Program of Research in Behavioral Modification, a 171-page record of the Joint Hearing Before the Senate Select Committee on Intelligence and the Subcommittee on Health and Scientific Research of the Committee on Human Resources, 95th Cong., 1st Sess. (1977).

[157] *See supra* note 100.

The problem with this rationale, however, was pointed out in a concurrence to *Sims*, written by Justice Thurgood Marshall and joined by Justice William Brennan. The two justices asserted that the majority created the undesirable precedent of giving the CIA unchecked discretion to decide whether to withhold information from the public.[159] Marshall and Brennan agreed in the result of the majority opinion[160] -- to withhold the identities of the MKULTRA researchers. But they declined to join the opinion because they believed the Exemption 3 rationale allowed the CIA to thwart efforts by Congress to balance the public's interest in access to information with the government's need for secrecy.[161] They believed the CIA should have been compelled to use the Exemption 1 exception citing national security because it provides for executive branch and judicial oversight. Marshall and Brennan concluded that the majority opinion to uphold the CIA's use of Exemption 3 resulted in unreviewable and virtually

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[158] 471 U.S. at 175.

[159] *Id.* at 186, 189, 192.

[160] *Id.* at 181.

[161] *Id.* at 182, 189.

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unlimited CIA discretion to withhold information requested under the FOIA.[162]

Under the precedent set by the Supreme Court in *Sims*, the courts have no discretion whatsoever to review withholding by the CIA under Exemption 3.[163] This decision has created a "judicial dead end" when it comes to oversight, thus removing the safety net that the checks and balances system provides. The CIA has used *Sims* successfully as precedent in at least 12 cases since 1985.[164] For example:

- In 1996, the Court of Appeals for the Ninth Circuit upheld the CIA's refusal to disclose whether Claude Barnes Capehart, acting as a CIA agent, was involved in an agency plot to assassinate President Kennedy.[165] Capehart, who died in 1989, claimed to have been a CIA agent involved in the Kennedy assassination. The CIA withheld the information on grounds of national security.

- In 1993, the Court of Appeals for the First Circuit upheld the CIA's position that national security justified the Agency's decision to withhold information wanted by the wife of a man who disappeared on a flight over Cuba in 1961 while supposedly distributing anti-Castro leaflets.[166] The information on his mission was ordered released by the district court, but the appeals court reversed the decision, ruling that the information falls under the protection of the National Security Act of 1947.

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[162] *Id.* at 191-92.

[163] Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992).

[164] Minier v. CIA, 88 F.3d 796 (9th Cir. 1996); Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993); Sullivan v. CIA, 992 F.2d 1249 (1st Cir. 1993); Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992); Knight v. CIA, 872 F.2d 660 (5th Cir. 1989); Fitzgibbon v. CIA, 911 F. 2d 755 (D.C. Cir. 1990); U.S. Student Assn. v. CIA, 620 F.Supp. (D.D.C. 1985).

[165] 88 F.3d 796.

[166] 986 F.2d 547.

- In 1992, the Court of Appeals for the Ninth Circuit upheld a CIA refusal to confirm or deny the existence of records requested by a murder defendant. The FOIA request was for information that concerned his alleged victim, an Iranian citizen with ties to the CIA and links to drug trafficking and blackmail.[167] The CIA said disclosing the information could jeopardize national security.

SUMMARY AND CONCLUSION

This analysis strongly suggests that the courts have allowed the government considerable leeway to use the two national security exceptions[168] to justify withholding information from the public. The model presented in this analysis shows how these types of cases typically fall into at least one of three categories. The model also illustrates some of the problems of access that arise when the government uses the court-granted latitude to withhold FOIA requests in the name of national security.

A persistent problem with Exemption 1 is the nearly automatic deference that courts give to government "expertise" in the national security area, as evidenced in the *Taylor* and *Knopf* cases. Another problem concerns the court's apparent willingness to go along with agency refusals to disclose important facts of history and dated government activities -- some going back 30 years and more -- as in the *Sims* and *Miller* cases.

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[167] 981 F.2d 1116.

[168] *See supra* note 9.

The problem with Exemption 3 is that it grants broad and unreviewable authority to the Director of Central Intelligence to withhold any information that, in his opinion, may threaten national security. Consequently, this national security exception places the intelligence agency beyond the orbit of the government's system of checks and balances, when it comes to access to records. Such a blanket exemption from FOIA disclosure requirements has disturbing implications in light of the CIA's troubled record. The appointment of George M. Tenet as acting CIA director in December 1996 gave the Agency its fifth director in less than 10 years. From 1994 to 1996 alone, there have been a series of embarrassing incidents that have contributed to the Agency's history of administrative problems, imprudent actions and outright misdeeds. Consider:

- In November 1996, career CIA officer Harold J. Nicholson was charged with espionage for betraying American spies and passing a wide range of top-secret information to Moscow. Nicholson, a former station chief in Romania, is the highest-ranking CIA employee arrested for spying.[169] Nicholson's arrest came two years after the government revealed in March of 1994 that CIA agent Aldrich H. Ames, a former chief of the soviet counterintelligence branch, had sold CIA secrets for nine years.[170]

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[169] Career CIA Officer Is Charged With Spying for Russia, Los Angeles Times, A-1, Nov. 14, 1996.

[170] "Deadly Mole," Newsweek, 24, March 7, 1994. The arrests of Nicholson and Ames are only the most recent in a series of publicized and unpublicized CIA counterintelligence failures going back to the mid

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- In October 1996, the government said it would investigate accusations that the CIA played a key role in introducing crack cocaine to the American inner cities to help finance U.S.-backed contra rebels in Nicaragua.[171]

- In October 1995, CIA Inspector General Frederick Hitz recommended that three former CIA directors be held accountable for disinformation that was passed to Presidents from Soviet double agents between 1986 and 1994. Hitz blamed R. James Woolsey, Robert M. Gates and William H. Webster for the CIA's failure to inform the White House that the CIA had known that much of the top-secret intelligence information acquired by the United States was obtained from Soviet double agents.[172]

- In February 1995, four CIA officers were accused by France of conducting an economic espionage operation against the French government. The CIA was, in effect, spying for Hollywood. The United States was unhappy with French demands to restrict imports of U.S. television programming into Europe, and part of the CIA operation was to determine the strength of the

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1980s. They include the late discovery and subsequent escape to Moscow of former CIA agent Edward Lee Howard in September 1985; the redefection of KGB officer Vitaly Yurchenko two months later; the 1987 discovery that almost all the 40 or so agents among Fidel Castro's military and intelligence services recruited by the CIA were really double agents; and the 1989 finding that the handful of East German agents recruited by the CIA were actually double agents. CIA Struggles to Find Identity in a New World; Ames Scandal Highlights Many Agency Problems, Washington Post, A-1, May 9, 1994.

[171] The investigation was prompted by an August 1996 series by the respected California newspaper *San Jose Mercury News* (winner of the 1986 Pulitzer prize), which asserted that the origins of the nation's crack epidemic can be linked to two major Nicaraguan drug traffickers linked to the Contra rebels. "U.S. Aides Vow Thorough Probe of CIA Crack Charge," Reuters North American Wire, Oct. 23, 1996.

[172] It was learned that between 1986 and 1994, CIA officers passed on at least 35 reports to top U.S. policy-makers without disclosing that the information came from suspected Soviet double agents. "CIA Linked to at Least 35 Suspect Reports," Los Angeles Times, A-21, Nov. 10, 1995.

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French bargaining position in television and telecommunications trade negotiations.[173]

The Freedom of Information Act[174] was passed to provide the public with a statutory right to know and ensure access to government-held information. The national security exceptions[175] were crafted to protect the government's needs to maintain secrecy in matters of intelligence and foreign affairs. Clearly, these two opposing policy objectives must be balanced in a democratic society. However, when actions to impose secrecy do not pass a balancing test that requires clear non-discretionary guidelines, these actions should be suspect. In the words of Thomas Jefferson, "Experience has shown that even under the best forms (of government), those entrusted with power have, in time, ... perverted it into tyranny. ... (I)t is believed that the most effectual means of preventing this would be to illuminate, as far as practicable, the minds of people at large."[176]

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[173] The bungled operation forced the CIA to suspend virtually all of its operations in France in 1995. The suspension almost certainly hurt the CIA's ability to collect information in France on international terrorism and arms smuggling. "Downplayed by CIA, Paris Incident Has Wide Impact," Los Angeles Times, A-1, Oct. 11, 1995.

[174] 5 U.S.C. Sec. 552 (1994).

[175] Exemption 1, the national security exemption to the FOIA, 5 U.S.C. Sec. 552(b)(1); and The National Security Act of 1947, which qualifies as a withholding statute under Exemption 3 to the FOIA, 5 U.S.C. Sec. 552(b)(3). *See generally* 471 U.S. 159.

[176] Proposed Bill for the More General Diffusion of Knowledge, in 2 The Writings of Thomas Jefferson, at 220-21 (P. Ford, ed., 1893).

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The Concept That Would Not Die:
Scarcity As a Justification for Broadcast Regulation

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The Concept That Would Not Die:
Scarcity As a Justification for Broadcast Regulation

I. Introduction

It may seem strange to talk of a "scarcity" in broadcasting, or any medium, in an age when *Time* magazine can devote a series of cover stories to the issue of whether there is too much information bombarding Americans.[1] Therein lies the paradox between a concept that goes back to the dawn of broadcasting and today's reality.

The concept that the airwaves constitute a scarce resource that must be regulated in the public interest is rooted in the early days of radio and the first broadcast regulations. It has survived the arrival of broadcast, cable, and satellite television, the development of thousands of radio stations, and the advent of the computer as a communications tool.

Although the Federal Communications Commission (FCC or Commission) often stated in the last fifteen years that scarcity was a dead issue, the U.S. Supreme Court has continued to use scarcity as a justification for regulating broadcast media differently than print media. Recently, the current FCC chairman, Reed Hundt, said that scarcity still exists and pledged new efforts to hold broadcasters accountable to the public interest, particularly in the content areas of indecency, children's television and violent programming.[2] Congress has shown a willingness to legislate in program content matters, even as both Congress and the FCC have backed off from efforts to regulate the business side of broadcasting.

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[1] RICHARD ZOGLIN, "The News Wars: On TV and radio, in print and over the Internet, news is everywhere. But are we better informed or just overwhelmed?" TIME 58-70 (Oct. 21, 1996).

This paper will attempt to sort out the up-and-down history of the scarcity concept as a justification for the regulation of broadcasters. Part II will explore the history of scarcity from the 1920's through the late 1970s. Part III will examine scarcity's fall from grace in the Fairness Doctrine decisions and court cases in the 1980s and 1990s. Part IV will look at recent court cases and congressional and FCC decisions that have kept the scarcity and public interest concepts alive. Part V will offer an analysis of whether the renewed efficacy of scarcity and Commission and Congressional decisions in recent years have led to a more coherent regulatory framework for broadcasting.

II. Scarcity's History: So Many Voices, So Little Spectrum

A. Broadcasting's Beginnings

The regulation of radio began before commercial radio, when Congress' major concern was aiding communication between sea-going vessels and between vessels and land stations. The Radio Act of 1912[3] forbade anyone from using radio equipment commercially without a license from the Secretary of Commerce, but most of the act dealt with regulations to prevent interference with government or ship communications.

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[2] *See* notes 62-111 *infra* and accompanying text.

[3] PUB. L. 62-264, 37 STAT. 302 (1912).

Commercial radio grew rapidly in the 1920s with virtually no regulation, but its success created problems. By the mid-1920s there were about 600 commercial radio stations in the United States, but many of them were interfering with each other by using the same frequencies. Industry leaders began calling on Commerce Secretary Herbert Hoover to do something about the problem. Hoover started refusing to issue licenses, saying no more wavelengths were available.[4]

However, in 1926, a U.S. District Court in Illinois ruled that the Commerce Secretary had no authority to order radio licensees to do anything other than obey the specific regulations in the 1912 Act. In the *Zenith* decision,[5] the court ruled that Hoover overstepped his authority when he tried to punish a Chicago station for operating on a different wavelength and at different times than those set out in the license.[6]

After the decision effectively handcuffed Hoover, more radio stations went on the air. By early 1927, there were 732 commercial stations operating.[7] Congress, at the urging of broadcasters, responded to the power vacuum that the court decision created by passing the Radio Act of 1927,[8] which created the Federal Radio Commission and established regulatory guidelines, some of which still exist.

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[4] ERIK BARNOUW, A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES I 174 (1966).

[5] UNITED STATES v. ZENITH RADIO CORPORATION, 12 F.2d 614 (N.D. ILL. 1926).

[6] *Id.*

The 1927 Act was a product of its times. Interference between stations and the government's allocation of spectrum had created the assumption that the airwaves were scarce. Scandals during the Harding administration, including one that involved the leasing of national oil reserves to private interests, had outraged conservationists and strengthened their cries for scarce national resources to be managed as public responsibilities.[9] For that reason, the 1927 Act proclaimed that licenses for use of the airwaves would be granted for limited times, but ownership would remain with the government.[10] The law also stated that decisions about who should be granted licenses should be based on the standard of the "public interest, convenience or necessity."[11]

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[7] BARNOUW, at 209.

[8] Pub. L. 632, 44 Stat. 1162 (1927).

[9] BARNOUW, at 195-196.

[10] 44 STAT. 1162 (1927), section 1.

[11] *Id.*, section 11.

The FRC was supposed to be a full-time body for only one year,[12] but the complexity of the task of setting rules, deciding on licenses and allocating wavelengths prompted Congress to continue extending its life. Seven years after creating the FRC, Congress passed the Communications Act of 1934[13], which replaced the FRC with the Federal Communications Commission, added telephone and telegraph regulation to its responsibilities, and kept its broadcast regulatory powers mostly intact.

Some modern scholars have suggested that the idea that the spectrum was a scarce resource requiring licensed public trustees was woefully misguided. According to these scholars, the government created a scarcity when it chose to give free licenses to broadcasters in order to encourage the growth of the medium. This free licensing encouraged more people than the market could bear to seek licenses and prompted wasteful use of the spectrum.[14]

Whatever the view is in hindsight, it seemed clear to Congress in 1927 that the government should regard the airwaves as a scarce resource, borrowed by licensees chosen in the "public interest, convenience or necessity" as public trustees. This view of the broadcasting world would survive a number of court challenges and other attacks for more than 50 years.

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[12] *Id.*, sections 3, 4 & 5.

[13] PUB. L. 73-416, 48 STAT. 1064 (1934).

[14] *See, e.g.*, ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 138-150 (1983).

B. The Commissions and Courts

Scarcity is never mentioned directly in either the 1927 Act or the 1934 Act, but the concept was behind the "public interest" standard. In effect, scarcity begat the public interest standard, which formed the basis for many of the broadcast regulations that followed. It was up to the FRC, FCC, and the courts to figure out what "public interest" meant.

The FRC issued a policy statement in 1928 in which it attempted to define the public interest in broadcasting. Along with technical matters related to interference, the statement also dealt with programming content. The statement said that broadcasters should not use their stations for private matters and that the interests of the audience should take precedence over licensee interests.[15]

A number of the FRC's early decisions based on its definition of public interest prompted lawsuits. In nearly all cases, the Court of Appeals for the District of Columbia upheld or expanded the public interest standard. The court overturned part of an FRC ruling and considered the quality of programming offered while resolving a dispute between Chicago radio stations over frequency reallocations;[16] upheld the FRC's rejection of license renewal for a station used to promote its owner's questionable medicinal products;[17] and upheld the FRC's denial of a renewal to a minister who used his radio broadcasts to attack public officials and the Roman Catholic Church.[18] None of the decisions questioned the scarcity concept behind the public interest standard, and those that mentioned it at all seemed to take it as a given.[19]

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[15] 2 FRC ANN. REP. 166-170 (1928).

[16] GREAT LAKES BROADCASTING CO. v. FRC, 37 F.2d 993 (D.C. CIRC. 1930); *cert. denied*, 281 U.S. 706 (1930).

After the FCC replaced the FRC, there was a brief moment in 1940 when the U.S. Supreme Court seemed to rethink the Commission's public interest definition. In the *Sanders Brothers* decision,[20] the Court upheld an FCC action to grant a license to one station after an existing station complained that it would be harmed economically because there was not enough advertising revenue available in the community to support both stations. In the course of the opinion, the Court also said that the FCC had no power under the 1934 Act to regulate licensees' business management, policies, or programming. The opinion stated that the broadcasting field was open to anyone who could show "competency, the adequacy of his equipment, and the financial ability to make good use of the assigned channel" if a frequency was available.[21]

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[17] KFKB v. FRC, 47 F.2d 670 (1931).

[18] TRINITY METHODIST CHURCH, SOUTH v. FRC, 62 F.2d 850 (1932); *cert. denied*, 288 U.S. 599 (1933).

[19] *See, e.g.*, United States v. American Bond & Mortgage Co., 31 F.2d 448 (1929); *rehearing denied*, 52 F.2d 318 (1931); *cert. denied*, 282 U.S. 374 (1931). The case involved a station owner who threatened to go on the air despite being denied license renewal. The opinion read in part:

> Considering the nature of radio, *the limitations of its field of operation*, the history of radio regulation, the circumstances existing immediately prior to the passage of the Radio Act of 1927, the complex problems to be solved, and the purposes of the legislation, it must be held that the Radio Act of 1927 ... [is] appropriate and adapted to the ends sought, and specifically that the provisions regulating the number of broadcasting stations and licenses are also appropriate, adapted and valid."

Id., at 457 (*emphasis added*).

[20] FCC v. SANDERS BROS. RADIO STATION, 309 U.S. 470 (1940).

But in 1943, the Supreme Court took a more liberal view of the FCC's powers and tied those powers more specifically to scarcity. In the *NBC* case,[22] the Court upheld Commission chain broadcasting rules limiting network control over radio stations. In detailing the history of radio regulation, Chief Justice Felix Frankfurter, writing for the Court, stated that among the "basic facts" of the medium were that "its facilities are limited" and that the spectrum was "not large enough to accommodate everybody."[23] He denied that the chain broadcasting rules violated broadcasters' First Amendment rights of free speech:

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is

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[21] *Id.*, at 475.

[22] Nat. Broadcasting Co. v. U.S., 319 U.S. 190 (1943).

[23] *Id.*, at 213.

> why, unlike other modes of expression, it is subject to government regulation.[24]

For the first time, then, the Court directly used scarcity as a justification for the regulation of broadcasting. It would not be the last time.

C. The Fairness Doctrine and *Red Lion*

The early 1940s were an active time for the FCC. In addition to the chain broadcasting rules, it adopted rules limiting the number of FM,[25] television,[26] and AM stations[27] that one company could own nationwide. The FCC also decided in the *Mayflower* case that radio stations could not editorialize about matters of public importance.[28] However, a few years later, the FCC issued its "Blue Book" detailing its view of the public service requirements for broadcasters.[29] The Commission noted that the airing of public affairs programming raised a number of questions, including: "Should commentators be forbidden, permitted, or encouraged to express their own personal opinions?"

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[24] *Id.*, at 226.

[25] 5 Fed. Reg. 2384 (1940).

[26] 6 Fed. Reg. 2284 (1941).

[27] 8 Fed. Reg. 16065 (1943).

[28] Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941).

[29] Federal Communications Commission, Public Service Responsibilities of Broadcast Licensees, March 7, 1946.

and "Should the 'right of reply' to broadcasts be afforded; and if so, to whom should the right be afforded, and under what circumstances?"[30] The FCC did not attempt to answer the questions, but stated that "the public interest clearly requires that an adequate amount of time be made available for the discussion of public issues" and added that the amount of time devoted to public affairs would be considered at license renewal time.[31]

The rule against editorializing coupled with an obligation to discuss public issues seemed a paradox to some broadcasters, however. After repeated pressure to reconsider its editorializing rules, the FCC in 1949 issued a report that gave birth to the Fairness Doctrine.[32] The report said broadcasters were obligated to (1) provide a reasonable amount of time for the presentation of public issues and (2) provide reasonable opportunities for contrasting views on controversial issues of public importance to be aired. The Commission also agreed to allow stations to editorialize.

Enforcing the Fairness Doctrine was not always popular, of course, and the Commission and the courts spent much of the next 20 years fine-tuning how the doctrine would be applied. One appeal of a Fairness Doctrine ruling resulted in the landmark *Red Lion* case.[33] The decision in that case also marked a sort of high-water mark for the efficacy of scarcity.

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[30] *Id.*, at 39-40.

[31] *Id.*, at 40.

[32] In the Matter of Editorializing by Broadcast Licenses, 13 F.C.C. 1246 (1949).

The FCC had amended the Fairness Doctrine in 1967 to require stations that had aired a personal attack of someone other than a political candidate, or foreign group or citizen, to offer that person a chance to respond on the air. Personal attacks in legitimate news broadcasts were excluded, however.[34]

The FCC rule change stemmed in part from the *Red Lion* case. A Pennsylvania station licensed to Red Lion Broadcasting had carried a broadcast by the Reverend Billy James Hargis in 1964 attacking the author of a book critical of Barry Goldwater, the Republican candidate for president that year. Hargis asserted that the author, Fred J. Cook, was fired from a newspaper job for making false charges against a New York City official and had been connected with "communist-affiliated" organizations. Cook demanded time to reply but was refused.[35]

In ruling that the FCC did not violate the First Amendment in ordering Red Lion to offer response time to Cook, Justice Byron White relied heavily on scarcity arguments. Noting that there were substantially more people who wanted to broadcast than available frequencies, White wrote that it was "idle to posit an unabridgeable First Amendment right to broadcast" comparable to individual speech and print rights.[36] Licensees had no rights greater than those of people who were not licensed to broadcast, White continued, and there was nothing in the First Amendment preventing the government from requiring broadcasters to present other views and voices that would not be heard otherwise.[37]

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[33] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[34] 47 C.F.R. sectión 73.1920 (1996).

[35] Red Lion v. FCC, 395 U.S. 367 (1969), at 371-372.

The Court rejected the notion that scarcity no longer existed because of technological advances, such as the use of microwave transmission, that made more uses of the spectrum possible. White wrote that uses for the spectrum had grown at the same pace as technology. Thus, he said, it would be "unwise to speculate on the future allocation of that space."[38]

The decision in *Red Lion* came even as cable television was beginning to grow as a competitor to broadcast television and the number of radio and television stations increased. In the 1980s, those market factors began to gain more attention and limit the efficacy of scarcity as a justification for broadcast regulation.

III. The FCC Reconsiders

The 1980s and the election of Ronald Reagan as president strengthened a new spirit of deregulation that had begun during the Carter administration. This was true at the FCC, where serious doubts about scarcity, the Fairness Doctrine, and other regulations were being entertained.

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[36] *Id.*, at 388.

[37] *Id.*, at 391.

[38] *Id.*, at 397, 399.

New FCC Chairman Mark Fowler signalled the new thinking at the FCC in 1982 when he and a colleague wrote an article urging that broadcasters be viewed as "marketplace participants" rather than public trustees.[39] Fowler argued that instead of trying to determine public demand and then ordering broadcasters to meet it, the FCC should let market forces determine what the public wanted and needed and allow broadcasters freedom to provide it.[40]

Fowler also wrote that it was time to rethink the scarcity concept. Arguing that all goods in society were scarce, Fowler suggested that economic forces were better controllers of the market than regulation. He said the true scarce resource was advertising dollars, not spectrum. The scarcity rationale also ignored the many channels open to viewers and listeners through other sources, such as cable, Fowler said. It was illogical, he added, to assume that a trusteeship model could protect consumers better than "a system relying on the judgment of marketplace players."[41]

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[39] MARK FOWLER AND DANIEL BRENNER, A MARKETPLACE APPROACH TO BROADCAST REGULATION, 60 Texas L. Rev. 207 (1982), at 209.

[40] *Id.*, at 210.

[41] *Id.*, at 221-226.

The Supreme Court remained unconvinced, however. In the *League of Women Voters* decision striking down a law banning editorials from publicly supported television stations,[42] the Court noted that scarcity had come under fire from a number of sources, notably Fowler. The Court said that it was unwilling to reconsider its long-standing approach to broadcast regulation "without some signal from Congress or the FCC" that technological changes had made that approach obsolete.[43]

The FCC soon began signalling like mad. In a 1985 Fairness Report,[44] the Commission said that the Fairness Doctrine was no longer needed because the "multiplicity of voices in the marketplace today" served the public interest in viewpoint diversity. The FCC also said that the Fairness Doctrine intruded into broadcasters' journalistic freedom and inhibited the presentation of controversial issues because broadcasters feared that any such presentation would trigger FCC enforcement of the doctrine.[45] However, the FCC declined to eliminate the Fairness

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[42] FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

[43] *Id.*, at 376-377, note 11.

[44] 102 F.C.C.2d 143 (1985).

[45] *Id.*, at 147.

Doctrine because it believed that a 1959 amendment to the Communications Act of 1934 had codified the doctrine.[46]

The FCC said it would await Congressional action before repealing the Fairness Doctrine.[47] Before Congress could act, however, the Circuit Court of Appeals for the District of Columbia ruled in *TRAC v. FCC* that the 1959 law did not codify the Fairness Doctrine.[48] In that same case, the court raised questions about the scarcity rationale. In trying to determine whether teletext services should be subject to the same Fairness Doctrine requirements as broadcasting, the court criticized *Red Lion* and its progeny for creating a "distinction without a difference" between print and broadcast media. All resources are scarce, including newsprint, ink and other resources used in print journalism, the court said, so the scarcity of broadcast frequencies did not explain the regulation of one type of medium but not the other.[49]

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[46] Pub. L. 86-274, 73 Stat. 557 (1959). The law, which exempted news programs from equal time provisions of the Fairness Doctrine, stated that the exemption did not relieve broadcasters of their duties to "afford reasonable opportunities for the discussion of conflicting views on issues of public importance." *Id.*

[47] 102 FCC 2d 143 (1985), at 247.

[48] Telecommunications Research and Action Ctr. v. FCC, 801 F.2d 501 (1986); *reh'g denied*, 806 F.2d 1115; *cert. denied*, 482 U.S. 919 (1986).

[49] *Id.*, at 508.

The FCC got another strong signal from the D.C. Circuit in 1987 that it could repeal the Fairness Doctrine. The *Meredith* case[50] involved a Fairness Doctrine complaint against a Syracuse, N.Y., television station that sponsored ads favoring the construction of a nuclear power plant. The FCC had ruled that the Meredith Corp. station violated the Fairness Doctrine by refusing to run opposing viewpoints. The Court of Appeals said that the FCC had undermined its own case by trying to enforce the Fairness Doctrine against Meredith while preparing a report repudiating the doctrine.[51] The court ordered the Commission to reconsider Meredith's constitutional arguments against the Fairness Doctrine. However, the judges said the FCC could avoid revisiting that issue if it decided that enforcing the Fairness Doctrine was, as it suggested in 1985, contrary to the public interest.[52]

Shortly after the decision in *Meredith*, the FCC issued a final report repealing the Fairness Doctrine.[53] Relying partly on the Court of Appeals' *dicta* in the *TRAC* case, the FCC said that it no longer believed that there was a scarcity of media outlets. Even if a scarcity of spectrum allocations existed, however, the

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[50] Meredith Corporation v. FCC, 809 F.2d 863 (1987).

[51] *Id.*, at 873.

[52] *Id.*, at 874.

[53] 2 FCC RCD. 5043 (1987).

FCC said that the situation did not justify treating broadcasters differently from publishers of print media.[54]

The FCC report in 1987 was upheld in an appeal of the *Meredith* case by the Syracuse Peace Council, which had brought the original complaint against Meredith Corp. The Court of Appeals for the District of Columbia ruled that the FCC's decision to scrap the Fairness Doctrine, and thus its ruling against the Syracuse Peace Council, was not arbitrary or capricious and allowed it to stand.[55]

As far as the FCC and the Court of Appeals were concerned, then, the Fairness Doctrine was dead, along with the scarcity rationale. But the Supreme Court never ruled on the Fairness Doctrine cases. So far, despite apparently receiving the signal it was looking for in *League of Women Voters*,[56] the Court has not discarded scarcity as a rationale for regulating broadcasting. As recently as 1994, in the *Turner Broadcasting* case, the Court said it still was not ready to question scarcity's "continuing validity as support for our broadcast jurisprudence."[57]

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[54] *Id.*, at 5054.

[55] Syracuse Peace Council v. FCC, 867 F.2d 654 (1989); *cert. denied*, 493 U.S. 1019 (1990).

[56] *Supra* note 42.

[57] Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2554 (1994), at 2457.

Despite the Supreme Court's refusal to do away with the scarcity rationale for broadcast regulation, the FCC's repudiation of it, supported by the D.C. Court of Appeals, seemed to relegate scarcity to the ranks of an obscure and ignored doctrine. However, the public interest concept remained intact, and Congress, the FCC and the courts began to apply it to programming in ways they never had before. Recently, through the comments of a new FCC chairman, scarcity began to regain its power as a rationale for broadcast regulation.

IV. The Public Interest, Indecency, Violence and Kids

Reed Hundt, who became FCC chairman in 1993 after his appointment by President Clinton, gave a series of speeches in late 1995 and early 1996 in which he attempted to reconcile the Commission's recent deregulatory past with its renewed interest in requiring certain acts of broadcasters. Hundt suggested that the FCC had gone too far in protecting broadcasters, resulting in rules that rarely were enforced and were too vague.[58] Hundt said his intent was that the FCC should deregulate all commercial aspects of broadcasting "best left to the market" while improving Commission regulation in those areas "where the market alone cannot deliver the services that Congress and the public·interest require."[59]

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[58] REED HUNDT, A NEW PARADIGM FOR BROADCAST REGULATION, 15 J. of L. & Comm. 527 (1996).

[59] *Id.*, at 529-530.

In language similar to that used by the Supreme Court in *Red Lion*, Hundt said that scarcity was still a sound rationale for broadcast regulation despite technological innovations, such as the use of digital rather than analog signals, that would allow more people to use the spectrum. Hundt said that even as engineers devised ways to expand spectrum availability, they were also devising new ways to use the spectrum, such as wireless communication.[60]

Hundt identified four areas in which market forces were unlikely to provide results compatible with broadcasters' public interest mandates: indecent programming, children's educational television, violent programming, and election campaign programming.[61] The evolution of government regulations and court decisions in indecency, children's television and violent programming will be discussed below.

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[60] *Id.*, at 542.

[61] REED HUNDT, THE PUBLIC'S AIRWAVES: WHAT DOES THE PUBLIC INTEREST REQUIRE OF TELEVISION BROADCASTERS? 45 Duke L.J. 1089 (1996). Campaign programming is not discussed in this paper because regulations in that area have been in the embryonic stage. However, in March 1997, President Clinton proposed that the FCC draft regulations requiring broadcasters to offer free air time to all qualified federal candidates for political office in exchange for new licenses for the digital spectrum. *See* JAMES BENNET, CLINTON SUGGESTS LICENSING DEAL FOR FREE TV TIME IN CAMPAIGNS, THE NEW YORK TIMES A-1, A-14 (March 12, 1997).

A. Indecency

The Radio Act of 1927[62] and the Communications Act of 1934[63] both banned the airing of "obscene, indecent, or profane language" over the airwaves. In a 1948 law overhauling the nation's penal code, Congress moved the language provision from the Communications Act to the penal code[64] but left enforcement with the FCC. The ban on foul language rarely was enforced, however, until 1975.

Although the Supreme Court ruled in the *Miller* case in 1973 that obscene speech was not protected by the First Amendment and attempted to define obscenity,[65] *indecency* in broadcasting was undefined legally until the FCC ruled in a complaint against a New York radio station licensed to the Pacifica Foundation. The station had broadcast comedian George Carlin's "Filthy Words" monologue, in which he recited the seven words that one supposedly was not allowed to use on the air. The monologue was broadcast in the afternoon, and a man driving with his son heard the broadcast and complained. The FCC said the language was not obscene but indecent because it described sexual and excretory activities and organs in a patently offensive manner, but did not appeal to a prurient interest. The Commission also said that the time of day the monologue was broadcast affected whether it would be considered indecent and suggested that indecency could be broadcast when children were unlikely to be present in the audience, from 10 p.m. to 6 a.m.[66]

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[62] PUB. L. 69-632, 44 STAT. 1162 (1927), section 29.

[63] PUB. L. 73-416, 48 STAT. 1064, sections 326 and 501.

[64] PUB. L. 80-772, 108 STAT. 2147 (1948), codified at 18 U.S.C. 1464.

[65] In Miller v. California, 413 U.S. 15 (1973), the Supreme Court said obscenity appealed to the prurient interest of an average person applying contemporary community standards; described or depicted sexual conduct, specifically defined by state law, in a patently offensive manner; and as a whole lacked any serious artistic, scientific, literary or political value.

The Commission warned Pacifica that it could be punished if more complaints were received. It based its decision on a number of factors, including children's access to radio when they were unsupervised by parents, the presence of radio in the home, where private interests deserved more deference, the lack of any warning that a person was about to hear indecent speech when he or she turned on a radio, and scarcity, which the FCC said justified treating broadcasting differently than other media.[67]

Pacifica appealed to the Supreme Court. In its 1978 decision, the Court did not address the scarcity argument in detail but, in a narrow decision, upheld the FCC indecency policy based on the idea that broadcasting had a "unique pervasiveness" and was able to "invade" the home. However, the Court said that the decision should be construed narrowly and that a determination that programming was indecent should be based on its context and accessibility to children.[68]

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[66] Pacifica Found. Inc., 56 FCC 2d 94 (1975).

[67] *Id.*, at 97.

The FCC confined enforcement of the indecency standard to the seven "filthy words" for nearly ten years. However, in 1987, the same year that it abolished the Fairness Doctrine, the Commission clarified its indecency standard by adopting the more generic definition in *Pacifica* concerning patently offensive language. The Commission also stated that the 10 p.m. to 6 a.m. "safe harbor" for the airing of indecent material was no longer sufficient because evidence showed that a substantial number of children were still in the audience after 10 p.m. However, the FCC did not state a specific time when indecency could be aired.[69] The FCC later set the safe harbor at midnight to 6 a.m.[70]

In three specific cases, the FCC warned broadcasters that future airings of shows it found indecent would be actionable but declined to issue sanctions. Two of the cases involved programs that used some of the "filthy words" after 10 p.m.[71] The third dealt with a Howard Stern show in which the "filthy words" were not used, but there was some discussion of sexual conduct and organs. The show aired from 6 a.m. to 10 a.m.[72]

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[68] FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[69] NEW INDECENCY ENFORCEMENT STANDARDS TO BE APPLIED TO ALL BROADCAST AND AMATEUR RADIO LICENSEES, 2 FCC RCD. 2726 (1987).

[70] 64 R.R.2d 211 (1987).

[71] In the Matter of Pacifica Foundation Inc., 2 FCC Rcd. 2698 (1987); In the Matter of The Regents of the University of California, 2 FCC Rcd. 2703 (1987).

In an appeal brought by Action for Children's Television (*ACT I*), the Court of Appeals upheld the revised definition of indecency but threw out the two cases involving broadcasts after 10 p.m., saying the Commission decision to change the safe harbor hours was arbitrary and capricious.[73] Congress then added a section to an appropriations bill banning all indecent material from the airwaves.[74] After the FCC adopted rules to reflect the new law,[75] the court ruled in *ACT II* that the total ban was unconstitutional because indecent speech was protected by the First Amendment. It ordered the FCC to come up with new regulations after a "full and fair hearing."[76]

Congress then passed a law banning indecent speech from 6 a.m. to midnight but allowing public stations to broadcast indecency after 10 p.m. if they went off the air at or before midnight.[77] After the FCC passed rules in line with the new law,[78] the court again ruled against the agency in *ACT III*, saying the distinction between commercial and public stations did not provide a basis for treating them differently.[79] In a 1995 rehearing *en banc*, the court upheld the FCC's ban on indecent programming from 6 a.m. to 10 p.m., essentially returning to Square One.[80]

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[72] In the Matter of Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd. 2705 (1987).

[73] Action for Children's Television v. FCC, 852 F.2d 1332 (1988) ("ACT I).

[74] Pub. L. 100-459, 102 Stat. 2186, @ 608 (1988).

[75] 5 FCC Rcd. 5297 (1990).

[76] Action for Children's Television v. FCC, 932 F.2d 1504 (1991), at 1510 ("ACT II"); *cert. denied*, 503 U.S. 913 (1992).

During the to-and-fro regarding the safe harbor, the FCC began to issue fines in record numbers for indecency violations. The most notable series of cases involved "shock jock" Howard Stern, whose program is syndicated nationwide by Infinity Broadcasting. In 1995, Infinity paid the FCC $1.7 million in fines accumulated since 1987 for Stern broadcasts in which sex and genitalia were discussed outside the "safe harbor" hours.[81]

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[77] Pub. L. 102-536, 106 Stat. 949 (1992).

[78] 8 FCC Rcd. 704 (1992).

[79] Action for Children's Television v. FCC, 11 F.3d 170 (1993) ("ACT III"); *rehearing en banc granted*, 15 F.3d 186 (1994).

[80] Action for Children's Television v. FCC, 58 F.3d 654 (1995) (*en banc*), *cert. denied*, 116 S. Ct. 701 (1996).

[81] DONNA PETROZZELLO, STERN GENERATES INDECENCY FINE AGAINST RICHMOND STATION: FCC ORDERS FORMER OWNER OF WVGO TO PAY $10,000. BROADCASTING & CABLE 23 (Oct. 21, 1996).

B. Children's Television

Efforts by the FCC and Congress to regulate indecency have been based, at least indirectly, on a perceived need to protect children from adult programming. Particularly since 1990, Congress and the FCC have tried to deal more directly with the issue of programming for children.

The public interest group Action for Children's Television asked the FCC to consider a number of rule changes and policies directed at children's television. Specifically, ACT wanted the Commission to ban commercials on children's television; stop performers from using or mentioning specific products during children's programs; and require each station to provide at least 14 hours of children's programming per week during hours when children were likely to be in the audience.[82] The FCC noted that it received more than 100,000 responses to its 1971 Notice of Inquiry seeking comments on proposed rule changes.[83]

Despite all the attention the Notice received and three years of gathering comments, however, the Commission decided not to adopt any formal rules concerning ACT's recommendations, instead relying on industry self-regulation to decrease the number of commercials and increase programming for children.[84]

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[82] REPORT AND POLICY STATEMENT, 50 FCC 2d 1 (1974); *recon. denied*, 55 FCC 2d 691 (1975).

[83] *Id.*, at 2.

[84] *Id.*

The FCC noted, however, that broadcasters "clearly" had a responsibility to serve the children in their audiences. Using television to meet children's educational and informational needs bore a "direct relationship" to a broadcaster's obligation to act in the "public interest," the FCC said.[85] The Commission adopted some general policy guidelines related to television programming, including discouraging host selling on children's programs, discouraging program-length commercials (in which the characters in the show were based on toys or other products advertised on commercials during the show), and encouraging a separation between shows and commercials so that children would not confuse commercials and program content.[86]

However, little was done to enforce the regulations, and the FCC seemed to have problems with the definitions. In 1985, for example, the Commission declined to find that a number of television stations had violated the policy against program-length commercials by airing shows based on toys and cereals that were also advertised. The shows included "He Man and the Masters of the Universe," "G.I. Joe: A Real American Hero," "Rubik the Amazing Cube," and "Strawberry Shortcake and Care Bears Family TV Fun Festival." The programs had "sufficient independent literary and educational merit" that they could not be said to be interwoven with the commercials, the FCC said.[87]

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[85] *Id.*, at 5.

[86] *Id.*, at 14.

The government did little to affect children's programming until Congress addressed the issue with the Children's Television Act of 1990 (CTA).[88] The CTA directed the Commission to adopt rules limiting commercials on children's television to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays.[89] The legislation also required the FCC to consider, during license renewal deliberations, whether a television licensee had met the advertising standard and had served the "educational and informational needs" of children through programming or non-broadcast efforts.[90] Congress also ordered the FCC to wrap up within 180 days a proceeding begun in 1983 to define "program-length commercials" and adopt rules for them.[91]

In April 1991, the FCC issued a Report and Order addressing the issues brought up by the CTA.[92] The Commission adopted the limit on advertising contained in the CTA and defined "children" as people 12 years old and younger, "commercial" as any air time "sold for purposes of selling a product" and "program" as "an identifiable unit of program material that is not a commercial or promotional announcement."[93] The Commission decided that for the purposes of programming, "children" would be defined as people 16 years old and younger.[94] "Educational and informational programming" was defined as programming that "furthers the positive development of the child in any respect, including the child's cognitive/intellectual or emotional/social needs."[95] The FCC also defined "program-length commercial" as "a program associated with a product in which commercials for that product are aired."[96] The definition effectively banned such programming because a "program-length" commercial would violate the limits on advertising on children's programs.

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[87] IN RE COMPLAINT OF ACTION FOR CHILDREN'S TELEVISION, 58 R.R.2d 61 (1985).

[88] PUB. L. 101-437, 104 STAT 996 (1990).

[89] *Id.*, section 102.

[90] *Id.*, section 103.

[91] *Id.*, section 104.

[92] 6 FCC RCD. 2111 (1991).

The 1991 report, and clarifications of parts of it in a subsequent reconsideration,[97] offered one of the FCC's first concrete efforts at regulating children's television in the public interest. However, although the order stated that compliance with the rules would be considered at license renewal time and fines could be imposed for violating the regulations,[98] no specific requirements for the amount of children's programming to be aired were adopted.

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[93] *Id.*, at 2111-2113.

[94] *Id.*, at 2114.

[95] *Id.*

[96] *Id.*, at 2117.

[97] 6 FCC RCD. 5093 (1991).

In 1995, the FCC issued a Notice of Proposed Rule Making in which it suggested that it was time to reconsider the 1991 decision.[99] The FCC said that its review of 320 license renewal applications had shown that the definitions of programming were too vague, allowing, for example, "Beverly Hills 90210" to be classified as "educational and informational."[100] The Commission proposed that children's programming should be specifically designed to meet the educational and informational needs of children 16 and under; be scheduled when children are likely to be in the audience, between 6 a.m. and 11 p.m.; and be identified as educational children's programming at the time it is aired and in program guides.[101]

The Commission also sought comment on whether it should monitor broadcaster performance to see if educational and informational programming for children increased; establish a guideline of three to five hours per week of such programming as a means of satisfying license renewal obligations; or set a programming standard of three to five hours per week that could be partly fulfilled by the broadcaster sponsoring children's programming on other stations.[102] In August 1996, the FCC adopted a Final Rule that requires broadcasters to offer three hours of children's programming per week and more sharply defines what counts as "educational and informational" programming.[103]

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[98] 6 FCC RCD. 2111 (1991), at 2117.

[99] 10 FCC RCD. 6308 (1995).

[100] *Id.*, at 6327.

[101] *Id.*

C. Violence

The government generally has relied on urging broadcasters to adopt voluntary standards to curb violence on television.[104] Concerns have been expressed in a number of social research studies that portrayals of violence on television lead indirectly to an increase in societal violence. The effects are particularly acute, researchers claim, when the violence is being watched by children.[105]

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[102] *Id.*, at 6331-6341.

[103] Final Rule, Children's Television, 61 FED. REG. 43981 (Aug. 27, 1996).

[104] *See, e.g.*, REPORT ON THE BROADCAST OF VIOLENT, INDECENT AND OBSCENE MATERIAL, 51 F.C.C.2d 418 (1975).

[105] There have been literally dozens of studies since the early 1960s exploring the effect of television violence on children. Two of the most recent are available on the World Wide Web. *See* UCLA CENTER FOR COMMUNICATION POLICY, THE UCLA TELEVISION VIOLENCE REPORT 1996, at http://www-ccp.sppsr.ucla.edu/violence96/ and MEDIASCOPE, NATIONAL TELEVISION VIOLENCE STUDY 1994-1995 at http://www.mediascope.org/ntvs1.htm

However, legal scholars generally have concluded that any government attempt to order programmers to limit violence would be unconstitutional censorship. In a postscript at the end of a law review article tracing the history of attempts to regulate violence, Harry T. Edwards, chief judge of the District of Columbia Court of Appeals, said he was not surprised at his conclusion that regulating violent programming probably was unconstitutional. As a father, however, Edwards said he wished he could "play God" and remove gratuitous violence from television to protect future generations from its effects.[106]

More recently, Congress has decided to try its hand at giving parents more power over the violence their children see. The Telecommunications Act of 1996[107] contains a provision that would require television manufacturers to install "V-chips" in all new sets. The circuitry would allow parents to block out programs containing certain levels of violence. The act tied the V-chip to a voluntary rating system that it urged programmers to develop within one year of the act's approval. Programmers would transmit signals containing rating information that could be read by the V-chip. If the programmers do not come up with a rating system of their own, the FCC is required to come up with one for them.[108] Television industry representatives introduced a rating system in December 1996 that took effect in January 1997, but the system almost immediately came under fire from critics who said it was not specific enough to help parents decide what programs their children could watch.[109] Negotiations between parents' groups and television industry representatives on a new rating system that would be more specific became acrimonious in June 1997 over the issue of whether there should be a moratorium on federal legislation in content and ratings areas.[110] At the time, a number of bills were pending that would either require licensees to use certain ratings systems or establish hotlines for complaints about offensive material.[111]

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[106] HARRY T. EDWARD AND MITCHELL N. BERMAN, REGULATING VIOLENCE ON TELEVISION, 89 Northwestern U.L. Rev. 1487 (1995), at 1566.

[107] Pub. L. 104-104, 110 Stat. 56 (1996).

V. Analysis

In the years before deregulation became a buzzword and Mark Fowler became FCC chairman, the government followed a two-tiered path of broadcast regulation. The Commission and its predecessor, the FRC, laid down some broad programming guidelines but generally stayed out of the business of micro-managing content.[112] In contrast, beginning in the late 1930s, the FCC passed a number of rules affecting the business side of broadcasting. Perhaps the most notable were the Commission's multiple ownership regulations,[113] which sought to assure that the public would be exposed to a diversity of viewpoints by ensuring a diversity of ownership.[114] This may have been a response to anti-monopoly and anti-censorship language in the Radio Act of 1927[115] and the Communications Act of 1934.[116]

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[108] *Id.*, section 551.

[109] JOHN M. BRODER, BROADCAST INDUSTRY DEFENDS ITS TV RATING SYSTEM, THE NEW YORK TIMES A-14 (Feb. 28, 1997).

[110] Lawrie Mifflin, "In Talks Over TV Ratings, Neither Side Expects a Deal Soon," THE NEW YORK TIMES A18 (June 27, 1997).

[111] *See, e.g.*, S. 409 (105th Cong.), LEXIS Full Text of Bills (requiring ratings systems); H.R. 1760 (105th Cong.), LEXIS Full Text of Bills (requiring ratings systems); H.R. 1017 (105th Cong.), LEXIS Full Text of Bills (requiring hotlines); and S. 607 (105th Cong.), LEXIS Full Text of Bills (requiring ratings systems).

Beginning in the mid-1980s, however, the FCC began to loosen restrictions on station ownership, increasing the number of radio and television stations a single company could own nationally[117] and abolishing the duopoly policy.[118] The Commission also repealed a number of requirements on the number of commercials a television station could air hourly, the keeping of program logs and the ascertainment of community programming needs.[119] At the same time, the FCC and Congress began getting more heavily involved in regulating programming, particularly in the areas of indecency, children's television, and violent shows.

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[112] *See* notes 16-24 *supra* and accompanying text.

[113] *See* notes 25-27 *supra* and accompanying text.

[114] In its Genesee Broadcasting decision in 1938, the FCC denied a radio station license to a company whose owners already controlled the only other radio station in Flint, MI. In that ruling, the Commission first articulated its "duopoly" policy, effectively barring a company from owning more than one station in the same market area. 5 F.C.C. 183 (1938).

[115] PUB. L. 69-632, 44 STAT. 1162 (1927), sections 15, 17 & 29.

[116] PUB. L. 73-416, 48 STAT. 1064 (1934), sections 303(i), 311, 313, 314 & 326.

[117] In 1984, the FCC increased the number of AM and FM radio stations and television stations one company could own nationwide from seven of each to twelve. 56 R.R.2d 887 (1984). In 1992, the limit was raised to 20 AM and 20 FM stations. 71 R.R.2d 227 (1992).

The V-chip legislation in the Telecommunications Act points to a paradox in the new thinking about the regulation of broadcasters. The V-chip imposes content regulation on violent programming for the first time. But in another section of the act, broadcasters receive relaxed rules on ownership restrictions both nationally and in local markets.[120] The relaxation of regulations related to the business side of broadcasting combined with stricter rules on content reflects Reed Hundt's contention that the public interest requires less control of commercial aspects of broadcasting and tighter control of other aspects.[121]

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[118] 71 R.R.2d 227 (1992). Companies were allowed to own up to three radio stations in smaller markets and up to four in larger markets. *Id.*

[119] 98 FCC 2d 1076 (1984).

[120] *Id.*, @ 202.

[121] *See* REED HUNDT, A NEW PARADIGM, *supra* note 58 and accompanying text.

In another provision of the Telecommunications Act, Congress expressly rejected an idea that would have allowed the government to get out of the business of regulating broadcast content. Ithiel de Sola Pool suggested in 1983 that the government could sell the spectrum to broadcasters instead of giving it to them free and treating it as a scarce resource.[122] That would allow broadcasters to compete in the open market for spectrum space and put them on much the same footing as print publishers, who enjoy broad First Amendment protection and control the resources of both production and dissemination of their publications.

Congress considered auctioning the spectrum for advanced television, which would use digital technology to deliver sharper pictures than the current analog technology and would allow many more signals to be sent over the same frequencies through compression technology. Instead, members decided to direct the FCC to give away the spectrum for advanced television services if it decided to develop digital technology and to give it to existing broadcasters.[123] This leaves broadcasters in much the same position they now are in: beholden to the government and subject to its policy zigs and zags on regulation.

The good news, if it can be called that, is that the FCC under Hundt, coupled with Congressional action, seem to be reaching an accommodation in the varying approaches to broadcast regulation. The government has done this by channeling the public interest requirement into a few areas and providing more specific rules in those areas, while unburdening the business side of the industry. What remains to be seen is whether freeing broadcasters from most limits on ownership will reduce the number of choices available to listeners and viewers, whose choices could be reduced further by government regulation of indecent and violent programming and children's television.

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[122] ITHIEL DE SOLA POOL, *supra* note 14.

[123] Conference Report on the Telecommunications Act of 1996, H. Rpt. 104-458, @ 336 (1996).

VI. Conclusion

The regulation of broadcasting began with the notion that the airwaves were a scarce national resource that must be regulated to protect the public interest. For that reason, the government decided to issue free licenses to broadcasters to use, but not own, the airwaves. Despite rapid developments in new media and technological changes that allowed more broadcasters to use the spectrum, the basic scarcity rationale for broadcast regulation has remained. At times, the FCC and the courts have pushed scarcity into a dark closet, but the Supreme Court has never locked the door.

The scarcity concept and the public interest standard that it helped spawn initially led to a system of broadcast regulation that kept a close government eye on ownership practices to sustain a diversity of voices. At the same time, mindful of censorship concerns, the government issued mostly broad guidelines concerning content. Later, scarcity became, at least in theory, less of a problem with more radio and television stations being created and new competition from cable and satellite television and computer on-line services. In response, the FCC began to ease business restrictions on broadcasters while offering a few guidelines on programming under a marketplace approach. In recent years, the FCC and Congress have stepped in to strengthen regulation in those areas in which the market did not seem to be providing content that met the public interest standard, while continuing to dismantle regulation of ownership and other business concerns.

The question still remains whether the scarcity concept is viable while consumers are being bombarded with news and information. The pragmatic answer is that scarcity remains a viable rationale for broadcast regulation as long as the Supreme Court and the FCC say it is viable. As long as broadcasters are tied to the government's apron strings by free licenses, the situation is unlikely to change. A wise person once said that there is no such thing as a free lunch, and the tab for free licenses means that broadcasters must remain trustees of a public resource. For the government to demand less of broadcasters would be irresponsible. However, there remains a great deal of leeway for determining what the public interest requires, as the evolution of broadcast regulation shows. Congress, the FCC, and broadcasters must continue to try to strike a balance between the private interests of communication companies and the public interest.

Sizing Up Trade Dress:
New Era of Cases Tests the Limits of the Lanham Act

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Sizing Up Trade Dress: New Era of Cases Tests the Limits of the Lanham Act

INTRODUCTION

Usually manufacturers want customers to think of their products as better and in some way different from their competitors' products. However, some manufacturers would rather trade on the awareness and leadership position of their competitors and therefore "dress" their products for the marketplace very similarly. Most stop short of illegally appropriating other brands' trademarks, but they sometimes emulate the leaders' package designs or other nonfunctional features – their "trade dress" – to imply similar quality at a reduced price or otherwise take advantage of the awareness the market leader enjoys among consumers. Indeed, as competitive pressures increase along with the expense of building one's own brand equity in the marketplace, companies in recent years have tread ever closer to that fine line between a valid "knock off" and outright infringement of their competitors' trade dress.[1]

For example, *In re Bristol-Myers Squibb v. McNeil-P.P.C., Inc.*,[2] the maker of Excedrin PM over-the-counter pain reliever sued the maker of Tylenol PM over use of the "PM" aspect of its trade dress. The Second Circuit Court of Appeals ruled that "PM" is a descriptive term and therefore not protectable.[3]

Developments in 1988, 1992, and again in 1995 have expanded trade dress protection and had a sweeping effect on subsequent trade dress litigation by making it easier for certain plaintiffs to protect their trade dress.[4] In 1988, amendments to the Lanham Act, the federal statute governing trademark registration, protection and use, expanded its protection of trade dress, which is a subset of trademark.[5] Prior to the 1988 Amendments, often referred to as § 43(a), federal law did not accord trade dress the same level of protection as trademarks. Now it does.

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[1] Joseph R. Dreitler, *Two Renegade Circuits Split Again on Trade Dress*, 18 NAT'L L.J., May 20, 1996, at C16.
[2] Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 973 F.2d 1033 (2d Cir. 1992).
[3] *Id.* "PM" refers to the formulation of the analgesic taken at night.

In 1992, the U.S. Supreme Court changed the standard for whether trade dress is protected under the Lanham Act in its unanimous landmark decision in *Two Pesos, Inc. v. Taco Cabana, Inc.*[6] Prior to *Two Pesos*, some courts required plaintiffs to prove both that their trade dress was inherently distinctive and that it had developed secondary meaning in the marketplace. The *Two Pesos* decision stated: "Trade dress that is inherently distinctive is protectable under § 43(a) *without* a showing that it has acquired secondary meaning (emphasis added)."[7]

The *Two Pesos* decision also partially resolved a prior conflict among federal Courts of Appeals regarding what types of trade dress are protected under the Lanham Act.[8] Prior to *Two Pesos*, the Fifth Circuit used a test that required proof of secondary meaning only when a trade dress was not distinctive enough to identify the producer of the product.[9] In contrast, the Second

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[4] Barry Werbin & Darlene Fairman, *'Inherently Distinctive' Gains New Clarification*, NAT'L LAW J., Feb. 12, 1996 at C30.

[5] 15 U.S.C. § 1125(a) (1988). The statute reads:
(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

[6] Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992).

> Trade that is inherently distinctive is protectable under § 43(a) without a showing that it has acquired secondary meaning, since such trade dress itself is capable of identifying products or services as coming from a specific source. This is the rule generally applicable to trademark, see, *e.g.*, *Restatement (Third) of Unfair Competition* § 13, pp. 37-38, and the protection of trademarks and of trade dress under § 43(a) serves the same statutory purpose of preventing deception and unfair competition. There is no textual basis for applying different analysis to the two.

[7] *Id.*

[8] *Id.* at 767.

[9] Chevron Chemical Co. v. Voluntary Purchasing Groups, Inc., 659 F.2d 695, 702 (5th Cir. 1981).

Circuit[10] only protected unregistered trademarks and designs with a showing of secondary meaning.[11] In *Two Pesos* the Court granted protection to trade dress that was unregistered without a showing of secondary meaning because the Court found it to be inherently distinctive.[12]

Furthermore, the *Two Pesos* decision interpreted the Lanham Act as applying similarly to both trademark and trade dress.[13] Until *Two Pesos*, the courts interpreted the Lanham Act as giving trade dress less protection than trademark.

In 1995, the U.S. Supreme Court in another unanimous decision, *Qualitex Co. v. Jacobsen Products Co., Inc.*, pointed to the 1988 changes in the Lanham Act as reasoning to strike down a long-standing precedent that had prohibited protection of color alone as a trademark.[14] Qualitex, a manufacturer of press pads used in the dry cleaning industry, was the only manufacturer for years that had constructed press pads in a particular green-gold color. When competitor Jacobsen Products began manufacturing its press pads in a similar color, Qualitex registered the color as a trademark and sued Jacobsen. The Ninth Circuit interpreted the Lanham Act as not protective of color alone as a trademark and ruled for Jacobsen. However, the U.S. Supreme Court reversed the decision and held: "The Lanham Act permits the registration of a trademark that consists, purely and simply, of a color."[15]

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[10] Vibrant Sales, Inc. v. New Body Boutique, Inc., 652 F.2d 299 (1981), *cert. denied*, 455 U.S. 909 (1982).

[11] *See* Two Pesos, 505 U.S. at 763.

[12] *Id.*

[13] *Id.*

[14] Qualitex Co. v. Jacobsen Products, Co., Inc., 115 S.Ct. 1300, 1301 (1995).

> There is no theoretical objection to use of color alone as trademark, where color has attained "secondary meaning," and therefore identifies and distinguishes particular brand, and thus indicates source. . . Lanham Act's changes have left courts free to evaluate preexisting legal precedent which had absolutely forbidden use of color alone as trademark.

[15] *Id.*

In addition, the *Qualitex* decision clarified the "functionality doctrine" in trademark law that prohibits protection of functional design features.[16] As stated in *Qualitex*: "The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm's reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature."[17]

Some legal scholars contend that the *Two Pesos* decision has created about as many new questions as it has answered and that the *Qualitex* decision does not resolve all the issues about protection of color as a trademark."[18] They argue that the courts have begun to interpret too broadly what actually constitutes trade dress because of the *Two Pesos* definition of trade dress as "the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques."[19]

New cases have begun to test the expanding definition of trade dress, particularly in the area of product configuration. For example, firms have sought trade dress protection for the shape of a flower pot,[20] the configuration of a fan grill,[21] and the design of a sweater.[22] Others have sought protection for the "look and feel" of computer user interfaces,[23] product color schemes,[24] and the markings and colors of pharmaceuticals[25] with varying levels of success.

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[16] *Id.* at 1304. "It is the province of patent law, not trademark law, to encourage invention by granting inventors a monopoly over new product designs or functions for a limited time, 35 U.S.C. §§ 154, 173, after which competitors are free to use the innovation."

[17] *Id.*

[18] *See, e.g.*, Harold Brown, *The Protection or Abuse of Trade Dress*, N.Y.L. J., March 24, 1994, 3; Vincent N. Palladino, *Trade Dress After Two Pesos*, 84 TRADEMARK REP. (1994), 408-417; Melissa R. Gleiberman, *From Fast Cars to Fast Food: Overbroad Protection of Product Trade Dress Under Section 43(a) of the Lanham Act*, 45 STAN. L. REV. (1993), 2037-65; Werbin & Fairman, *supra* note 4; Paul R. Morico, *Protecting Color Per Se in the Wake of Qualitex v. Jacobsen*, 77 JPTOS (1995), 571-82.

[19] *See* Two Pesos, 505 U.S. at 764, quoting John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 980 (11th Cir. 1983).

[20] Duraco Products, Inc. v. Joy Plastic Enterprises, Ltd., 40 F.3d 1431 (3d Cir. 1994).

[21] Vornado Air Circulation Systems, Inc. v. Duracraft Corp., 58 F.3d 1498 (10th Cir. 1995), *cert denied*, 116 S.Ct. 753 (1996).

[22] Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996 (2d Cir. 1995).

In the wake of *Two Pesos*, the federal Courts of Appeals remain divided about the appropriate tests to apply to particular fact patterns in trade dress cases.[26] Also, legal scholars debate whether certain cases are really issues of patent or copyright law rather than trade dress law.[27] Meanwhile, companies often do not know how closely they can emulate competitors' trade dress or how well protected their own trade dress is until they wind up in court. Indeed, trade dress has developed into the most hotly contested area of trademark law today.[28]

The U.S. government protects creative works, inventions, and the ability to market them with distinctive marks and packaging under separate copyright, patent, and trademark statutes. While so closely allied that some products qualify for more than one type of protection, each statute has specific applications. Trade dress falls within the scope of trademark law (the Lanham

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[23] Lauren Fisher Kellner, *Trade Dress Protection for Computer User Interface "Look and Feel,"* 61 U. CHI. L. REV., 1011-36 (1994). *See, e.g.*, Apple Computer, Inc. v. Microsoft Corp., 799 F. Supp 1006 (N.D. Cal. 1992); Lotus Development Corp. v. Borland Int'l, Inc., 799 F. Supp 203 (D. Mass 1992) ("Lotus II"); Lotus Development Corp. v. Paperback Software Int'l, 740 F. Supp 37 (D. Mass 1990) ("Lotus I").

[24] Lawrence B. Ebert, *Trademark Protection In Color: Do It By The Numbers!* 84 TMR, n.4, 379-407. *See, e.g., In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116 (Fed. Cir. 1985), *revg* 221 USPQ 1195 (TTAB 1984); NutraSweet Co. v. Stadt Co., 917 F.2d 1024 (7th Cir. 1990), *cert denied* 111 S.Ct 1640 (1991); *See* Qualitex, 115 S.Ct. at 1300.

[25] James B. McLaren, Jr., *Lanham Act Protection From The Copying Of Trade Dress By Generic Drug Manufacturers*, 38 WASH. & LEE L. REV., 1225-36.

[26] Dreitler, *supra* note 1.

[27] *See, e.g., Intellectual Property – Patent and Trade Dress Law – Tenth Circuit Applies "Significant Inventive Aspect" Test To Determine Whether Utility Patent Precludes Trade Dress Protection*, 109 HARV. L. REV. 1457-62 (1996); William B. Bunker, *Dress Blues: Patent Protection for Product Features and Configurations May Preclude Trade Dress Protection*, L.A. DAILY JOURNAL, Dec. 1, 1995, 7; Eugene M. Gelernter & Andrew D. Schau, *Trade Dress Law Meets Patent Protection*, NEW YORK LAW JOURNAL, Mar. 21, 1996 at 1; Palladino, *supra* note 18; James P. Flynn & Brian Lee, *Confusion Reigns Over 'Confusion' Standards*, 141 N.J.L.J. 10 (1995); Gleiberman, *supra* note 18; Lawrence Freidman & Joshua Rawson, *Could Trade Dress Be Shrinking?*, 214 N.Y.L.J. (Dec. 4, 1995), at S3.

[28] Dreitler, *supra* note 1; Werbin & Fairman, *supra* note 4.

Act),[29] which seeks to eliminate confusion and unfair competition in the marketplace by protecting marks that serve to identify a product's manufacturing source.[30]

An important distinction between trademark, copyright and patent law is that trademarks enjoy renewable protection as long as they remain in use. Copyrights and patents have limited terms of protection.

Plaintiffs do not have to register trademarks in order to sue for infringement.[31] However, trademarks may be registered if they are distinctive and not generic or merely descriptive[32] and if they are non-functional.[33] How the courts interpret the requirements of inherent distinctiveness and non-functionality are central issues in the debate over what types of trade dress deserve protection.[34]

The Lanham Act provides guidelines to the courts as to what factors they may consider in determining whether a trademark is distinctive.[35] However, neither the Lanham Act nor the courts have adequately defined one of the key factors, "inherent distinctiveness."[36] Due to the lack of clear guidance, the individual federal Courts of Appeals apply tests from prior case law to determine whether a trademark is inherently distinctive. The federal Courts of Appeals are not in agreement.[37]

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[29] 15 U.S.C. § 1125(a) (1988), *supra* note 5.

[30] Jane C. Ginsburg et al., eds., Trademark and Unfair Competition Law (2d ed. 1996).

[31] *Id.* 15 U.S.C. § 1059(a) (1988).

[32] 15 U.S.C. § 1052 (1988). The statute reads:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—. . .

(e) Consists of a mark which—

(1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them . . .

Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9-10 (2d Cir. 1976).

> A generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species. The term "spoon" is generic when it identifies the article with which one eats soup. The term "deep bowl" is descriptive of the term "spoon" because it describes a significant characteristic of the article.

[33] Restatement of the Law (Third) of Unfair Competition § 17 cmt. b, at 173.

> A packaging or product feature is not functional merely because the feature serves a utilitarian purpose. The recognition of trademark rights is precluded only when the particular design affords benefits that are not practically available through alternative designs. A bottle, for example, is a utilitarian element of the packaging for wine, but the design of a particular wine bottle is not functional under the rule of this Section unless the shape or other aspects of the bottle provide significant benefits that are not practically obtainable through the use of alternative bottle designs.

[34] See, *e.g.*, Werbin & Fairman, *supra* note 4.

[35] 15 U.S.C. § 1125c(1) (1988). The statute reads:

The purpose of this paper is to examine the impact of the 1988 Amendments to the Lanham Act and the Supreme Court's decisions in *Two Pesos* and *Qualitex* on trade dress litigation.

LITERATURE REVIEW

The following literature review will examine recent scholarship on trade dress. Because legal scholars generally write about individual cases or specific categories of trade dress, this literature review will be divided similarly into the following categories: product configuration, private label manufacturing, color, and computer software user interfaces. The purpose is to underscore the key differences among types of cases, why legal scholars argue for or against

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The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection. In determining whether a mark is distinctive and famous, a court may consider factors such as, but not limited to—

(A) the degree of inherent or acquired distinctiveness of the mark;
(B) the duration and extent of the use of the mark in connection with the goods or services with which the mark is used;
(C) the duration and extent of advertising and publicity of the mark;
(D) the geographical extent of the trading area in which the mark is used;
(E) the channels of trade for the goods or services with which the mark is used;
(F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks' owner and the person against whom the injunction is sought;
(G) the nature and extent of use of the same or similar marks by third parties; and
(H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

[36] Werbin & Fairman, *supra* note 4.

[37] Dreitler, *supra* note 1, at C19.

Lanham Act protection of trade dress in each and how they compare and contrast different types of trade dress litigation.

Legal scholars agree that the 1988 amendments to the Lanham Act, followed by the *Two Pesos* and *Qualitex* U.S. Supreme Court decisions, have ushered in a new era of trade dress litigation. However, while some laud these developments as settling several splits among federal circuits or better recognizing the realities and competitive pressures of the marketplace, they also point out many questions left unanswered.[38] A large body of legal scholarship is devoted to the complicated issues surrounding application of new trade dress law to product configuration cases.[39] A number of scholars argue that trade dress protection has become too broad and oversteps patent law.[40]

Product Configuration

A host of product configuration cases that seek trade dress protection for the shape or design of the products themselves rather than just their packaging have emerged in recent years. These cases challenge established notions of how courts should decide trade dress cases. They are more difficult than packaging and other traditional trade dress cases for a number of reasons.

First, they often allege more than one type of infringement – trade dress and patent or copyright – that the courts must rule on separately. As mentioned previously, trade dress by its definition is non-functional. In product configuration cases, the courts have the difficult task of trying to rule on non-functional (trade dress) aspects of the product designs themselves.

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[38] *See, e.g.*, Dreitler, *supra* note 1; Werbin & Fairman, *supra* note 4; Brown, *supra* note 18; Palladino, *supra* note 18; Gleiberman, *supra* note 18; James Davey, *Intellectual Property-Trademarks-The Lanham Act Permits The Registration of Color Alone As A Trademark*, 63 TENN. L.R. (1995), 261-80; Morico, *supra* note 18; Jonathan Hudis, *Removing The Boundaries Of Color*, 86 TRADEMARK REP. (1996), 1-10.

[39] *See, e.g.*, Harv. L. Rev., *supra* note 27; Bunker, *supra* note 27; Gelernter & Schau, *supra* note 27; Palladino, *supra* note 18.

For example, *In re Knitwaves, Inc. v. Lollytogs Ltd.* the Second Circuit had to rule on whether a copyrighted sweater design was also protectable trade dress.[41] Knitwaves won on the issue of the copyright infringement, but did not win protection of the sweater design as trade dress. The Second Circuit said the "manufacturer's objective in the sweater designs was primarily aesthetic, and . . . not primarily intended as source identification."[42]

The federal circuits are also divided on which party bears the burden of proving whether a trade dress is functional or non-functional. [43] The Third,[44] Eighth,[45] Ninth,[46] and Eleventh[47] Circuits require the plaintiff to prove that the trade dress in question is non-functional. The Seventh Circuit [48] requires the defendant to prove that the trade dress is functional. The Second[49] and Tenth[50] Circuits allow the defendant to use as a defense proof that the trade dress is functional.

An unsigned article in the *Harvard Law Review*[51] questioned the wisdom of the 1995 Tenth Circuit decision in *Vornado Air Circulation Systems, Inc. v. Duracraft Corp.*[52] The Tenth Circuit held that when the disputed product configuration is part of a claim in a utility patent and

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[40] Gleiberman, *supra* note 18; Flynn & Lee, *supra* note 27; Friedman & Rawson, *supra* note 27.

[41] *See* Knitwaves, 71 F.3d at 996.

[42] *Id.* at 997.

[43] *See, e.g.*, HARV. L. REV., *supra* note 27; Gelernter & Schau, *supra* note 27; Dreitler, *supra* note 1; Werbin & Fairman, *supra* note 4, Bunker, *supra* note 27; Kevin F. Hormuth, *Trade Dress Infringement In The Eighth Circuit: Stuart Hall Co., Inc. v. Ampad Corp.*, 29 CREIGHTON L. REV., 1421-65 (1996).

[44] Merchants & Evans, Inc. v. Roosevelt Bldg. Prods. Co., 963 F.2d 628, 633 (3d Cir. 1992).

[45] Tone Bros., Inc. v. Sysco Corp., 28 F.3d 1192 (Fed. Cir. 1994).

[46] Keystone Retaining Wall Systems, Inc. v. Westrock, Inc. (Fed. Cir. 1993).

[47] Elmer v. ICC Fabricating, Inc., 67 F.3d 1571 (Fed. Cir. 1995).

[48] Computer Care v. Service Sys. Enter., 982 F.2d 1063, 1068 (7th Cir. 1992).

[49] *See* Knitwaves, 71 F.3d at 1005. Quoting Villeroy & Boch v. THC, 999 F.2d at 620 (2d Cir. 1993): "A defendant may avoid liability under § 43(a) of the Lanham Act if he or she is able to demonstrate that the allegedly similar trade dress feature is 'functional.'"

[50] *See* Vornado, 58 F.3d at 1498.

[51] HARV. L. REV., *supra* note 27.

[52] *Id.* At issue was the configuration of a household fan grill for which the plaintiff, Vornado, held two utility patents. In copying Vornado's configuration, the defendant, Duracraft, did not infringe upon the patents. So,

the configuration is an aspect of the invention "so that without it the invention could not fairly be said to be the same invention, patent law prevents its protection as trade dress, even if configuration is non-functional."[53] A utility patent protects "any novel, non-obvious, and useful machine, article of manufacture, composition of matter or process."[54]

The *Harvard Law Review* argued that the *Vornado* test "obscures the crucial issue of whether granting trade dress rights would prevent the patented invention from entering the public domain upon the patent's expiration."[55] This is important because, as noted previously, patent rights have a finite term, while trade dress protection is renewable indefinitely. Therefore, as Eugene M. Gelernter and Andrew D. Schau recently pointed out in *The New York Law Journal*, defendants argue that granting trade dress protection to a product feature whose patent has expired is tantamount to giving a monopoly to an invention that rightfully belongs in the public domain where others may legally copy it.[56]

Furthermore, the *Harvard Law Review* noted that the Tenth Circuit test "does not teach *how* to identify which product features for which utility patent protection should bar trade dress rights."[57] Gerlernter and Schau observed that two recent decisions in the Southern District of New York[58] have balanced the requirements of patent and trade dress law. They noted that these decisions are consistent with others on the same issue in the Sixth, Seventh, and Eighth Circuits.[59]

Vornado sued for trade dress infringement under the Lanham Act. The Tenth Circuit, without considering the trade dress issue, reversed the district court's ruling in favor of Vornado.

[53] *Id.* at 1499.

[54] BLACK'S LAW DICTIONARY 1125 (6th ed. 1990).

[55] HARV. L. REV., *supra* note 27, at 1457.

[56] Gelernter & Schau, *supra* note 27.

[57] HARV. L. REV., *supra* note 27, at 1459.

[58] *See* Krueger International Inc. v. Nightingale Inc., 1996 U.S. Dist. Lexis 930 (S.D.N.Y. 1996); Hubbell Inc. v. Pass & Seymour Inc., (S.D.N.Y. 1996).

[59] Gelernter & Schau, *supra* note 27, at 6.

William Bunker, writing in the *Los Angeles Daily Journal*, noted that the *Qualitex* decision also addressed this "functionality doctrine" of product configuration cases.[60]

Private Label Manufacturers

The key issues in cases alleging trade dress infringement by private label manufacturers of branded products are somewhat different from those in product configuration cases. Here cases generally involve packaging (size, shape, color, and labeling),[61] rather than the design of the products themselves. The courts usually must rule on whether the trade dress of the private-label product is likely to cause consumers to confuse it with the brand name product.[62]

Joseph Diamante and Darren W. Saunders explained in *The National Law Journal* how discount retailers and large supermarket chains have gained market share in recent years, not only with efficient distribution systems, but also by selling their own privately labeled products alongside name brands but at lower prices. As part of the strategy, they often dress their products very similarly to the competing national brands. For example, the private label manufacturer may package shampoo in a bottle of similar shape and color as a name brand, but use a clear enough label to help consumers distinguish between the two products. Private-label manufacturers argue they must do this to help consumers make choices between high and low-priced alternatives.[63] At the same time, private-label manufacturers capitalize on the enormous advertising and promotional expenditures of their name brand competitors.[64]

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[60] Bunker, *supra* note 27, quoting Qualitex, 115 S.Ct. at 1304.

[61] Joseph Diamante & Darren W. Saunders, *Four federal court decisions have limited the extent to which private-label manufacturers can copy the packaging of their national-brand counterparts*, NAT'L L. J., July 18, 1994, B5-6.

[62] *See* 15 U.S.C. § 1125 (1988), *supra* note 5.

[63] *See* Diamante & Saunders, *supra* note 61, at B5; Andrew Corydon Finch, *When Imitation Is the Sincerest Form of Flattery: Private Label Products and the Role of Intention in Determining Trade Dress Infringement*, 63 U. CHI. L. REV. (1996), 1243-76.

[64] Diamante & Saunders, *supra* note 61, at B5.

On the other hand, Diamante and Saunders reported that name brands argue that private-label manufacturers cross the line of fair competition when they copy trade dress and use the brands' trademarks on their own labels for comparison purposes.[65] For example, *In re Conopco, Inc. v. May Department Stores Co.*,[66] the manufacturer of Vaseline Intensive Care Lotion specifically redesigned its packaging, including the bottle design, to differentiate itself from others in the market. Venture Stores, Inc., owned by May Department Stores, copied the Vaseline Intensive Care package for its house brand of skin care lotion. Not only did Venture copy the color combinations on the label, but also Vaseline's trademark as part of the statement "Compare to Vaseline Intensive Care."[67] In a surprising decision, the Federal Circuit did not protect Vaseline Intensive Care's trade dress. Instead it ruled in favor of the private-label manufacturer.[68]

To make matters worse, Diamante and Saunders wrote, name brands are often in the position of wanting to sue the very retailer that distributes their products, a move that could have long-term negative repercussions. For this reason, name brands often tolerate copying of their trade dress longer than they would under different circumstances, even though the courts have traditionally favored plaintiffs.[69]

Diamante and Saunders wrote that courts have generally presumed that when a private-label manufacturer copies the trade dress of a name brand, it intends to cause confusion among customers. This presumption of intent to confuse is a key factor in courts often deciding against private-label manufacturers.[70]

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[65] *Id.*
[66] Conopco, Inc. v. May Department Stores Co., 46 F.3d 1556 (Fed. Cir. 1994), *cert denied*, 115 S. Ct. 1724 (1995).
[67] *Id. See also* Diamante & Saunders, *supra* note 61.
[68] *See* Conopco, 46 F.3d at 1556.
[69] Diamante & Saunders, *supra* note 61.
[70] *Id.*

In determining the merits of a trade dress claim, Andrew Corydon Finch observed in *The University of Chicago Law Review*:

> While each of these circuits recognizes a slightly different set of factors, the list usually includes (1) the strength of the plaintiff's trade dress; (2) the similarity of the plaintiff's and the defendant's trade dresses; (3) the similarity of the plaintiff's and the defendant's products; (4) the similarity of the advertising media used by the parties; (5) the likely sophistication and degree of care exercised by consumers; (6) evidence of actual confusion; and (7) the defendant's intent in adopting its trade dress.[71]

Finch argued that the courts should not automatically presume a likelihood of confusion upon showing an intent to copy on the part of the defendant.[72] Indeed, the circuits are divided on this issue as well.[73]

One reason a competitor might copy the trade dress of another is because it is the custom in the industry or for that class of product. An example given by Finch is the packaging by many soft drink manufacturers of lime soda in green as a common signal to consumers about the lime flavoring.[74] Another reason to copy, according to Finch, is to inform consumers about a legitimate lower-priced alternative and to signal that quality is essentially the same. In both cases, Finch argued, the courts should not presume "an intent to confuse or likelihood of confusion from the mere fact of intentional copying."[75]

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[71] Finch, *supra* note 61, at 1248-49.

[72] *Id.* at 1244.

[73] *Id.* at 1253.

Almost every circuit recognizes the defendant's intent as a factor in determining likelihood of confusion in the trademark context. Most of these circuits also recognize the defendant's intent as a factor in determining trade dress infringement under § 43(a). In some of these circuits, however the defendant's intent is more than just one factor among many. Several circuits have held that intentional copying of trade dress, without more, raises a presumption of a likelihood of confusion. Other circuits have held that, while mere intentional copying is not enough on its own, copying with the intent to deceive or confuse consumers is sufficient to raise such a presumption. A few circuits, however, reject all such presumptions and recognize the defendant's intention as only one factor among many to be considered in determining whether there is any likelihood of confusion.

[74] *Id.* at 1255-56.

[75] *Id.*

Finch also noted two cases, one in the Third Circuit[76] and one in the Seventh Circuit,[77] where the courts "have explicitly rejected the notion that either an intent to copy or an intent to confuse should raise a presumption of a likelihood of confusion."[78] These examples also illustrate the application of judicial reasoning across different categories of trade dress cases.[79]

Samuel D. Rosen and Lisa M. Gigliotti analyzed the *Conopco*[80] decision in great detail.[81] They explained the Federal Circuit's reasoning in allowing the private-label manufacturer to copy the trade dress of Vaseline Intensive Care Lotion as a "legitimate means to convey to the public a message of equivalency."[82]

However, Rosen and Gigliotti cautioned manufacturers about the implications of this case: "To those few in the private label industry who believe *Conopco* gives them a hunting license, they would do well to compute the probability of their infringing activities being judged by the Federal Circuit or, indeed, a particular panel of that court."[83] They viewed the opinion as "an attack on the importance of trade dress as a source identifier to consumers. . . .Not only is the Federal Circuit's endorsement of commercial piracy wanting for any support in Eighth Circuit law, it runs counter to established precedent from other courts."[84] Once again, the courts cannot agree on the application of trade dress protection.

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[76] *In re* American Home Products Corp. v. Barr Laboratories, Inc., the plaintiff alleged that the defendant had infringed upon the brown trade dress of Advil ibuprofen tablets (color).

[77] *In re* Versa Products v. Bifold Co. (Manufacturing) Ltd., the plaintiff alleged copying of control valves used in offshore oil-drilling rigs (product configuration).

[78] *Id.* at 1260.

[79] *Id.* at 1260-61.

[80] *See* Conopco, 46 F.3d at 1556.

[81] Samuel D. Rosen & Lisa M. *Gigliotti, Conopco—Kaputco For Trade Dress Plaintiffs?* 85 THE TRADEMARK REP. (1995), 135-60.

[82] *Id.* at 139.

[83] *Id.* at 136.

[84] *Id.* at 140.

Color

Prior to the *Qualitex* decision, Lawrence B. Ebert wrote about the courts' long tradition of invoking the "color depletion theory" to rule against plaintiffs who sought protection for color alone as a trade dress.[85] The color depletion theory was established in a 1949 Third Circuit decision against Campbell Soup,[86] which sought protection for the color red for the labels of its soup cans. The court held that colors are in limited supply and that if they were protectable as trademarks, manufacturers would soon run out of available colors to use for packaging.[87]

Ebert argued for the courts to "engage in a factual analysis of functionality, secondary meaning, and competitive need to determine if protection in color per se is warranted."[88] Indeed, other scholars agreed that the time had come for the U.S. Supreme Court to consider this issue, especially in light of a split between federal Courts of Appeals.[89]

Thus scholars generally lauded the *Qualitex* decision because it allowed protection of color alone as a trademark.[90] However, Paul R. Morico wrote in *Journal of the Trademark and Patent Office Society* that "many barriers to obtaining and maintaining trademark rights in color *per se* remain."[91] Primarily, he noted, color marks are "rarely inherently distinctive, often require substantial promotion to acquire secondary meaning, and even if capable of serving as indicia of origin are often functional and hence unprotectable."[92]

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[85] Ebert, *supra* note 24.

[86] Campbell Soup v. Armour & Co., 175 F.2d 795 (3rd Cir. 1949), *cert denied*, 338 U.S. 847 (1949).

[87] *See* Qualitex, 115 S.Ct. at 1305.

[88] Ebert, *supra* note 24. *See also* Campbell Soup, 175 F.2d at 795.

> What the plaintiffs are really asking for, then is a right to the exclusive use of labels which are half red and half white for food products. If they may thus monopolize red in all of its shades the next manufacturer may monopolize orange in all its shades and the next yellow in the same way. Obviously, the list of colors will soon run out.

[89] Craig Summerfield, *Color As A Trademark And The Mere Color Rule: The Circuit Split For Color Alone*, 68 Chicago-Kent L.R. (1993), 973-1003. *See NutraSweet* and *Owens-Corning*, *supra* note 13.

[90] Davey, *supra* note 38; Morico, *supra* note 18; Hudis, *supra* note 38.

[91] Morico, *supra* note 18, at 571.

In addition, Jonathan Hudis noted in *The Trademark Reporter* that the U.S. Supreme Court left an important question unanswered in the *Qualitex* decision as to whether a color used as a trademark that was found to be inherently distinctive is still protectable without a showing that it had acquired secondary meaning in the marketplace. Hudis argued that by also applying the *Two Pesos* decision, courts could find protection for color trademarks and trade dress in such instances.[93]

Interestingly, James Davey suggested in the *Tennessee Law Review* that the *Qualitex* decision "could have a profound impact in the age of computers and the information superhighway."[94] He predicted that a reading of the decision could prompt companies to seek trademark protection for the background colors of computer screens.[95]

Computer User Interfaces

Cases alleging trade dress infringement for computer software user interfaces is an emerging area of litigation that touches upon patent, copyright, and trade dress law. User interfaces are known more commonly as the "look and feel" of the software product to the consumer, such as the icon-based environments of MacIntosh and Microsoft Windows.[96] A key issue in these cases is whether the interface can really serve as an identifier of the source manufacturer, a fundamental purpose of trade dress protection.[97] Scholars are divided on whether computer user interfaces deserve trade dress protection.

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[92] *Id.*
[93] Hudis, *supra* note 38, at 9.
[94] Davey, *supra* note 38, at 27.
[95] *Id.*
[96] Richard Armstrong Beutel, *Trade Dress Protection for the "Look and Feel" of Software: The Lanham Act as an Emerging Source of Proprietary Rights Protection for Software Developers* JPTOS (December 1989), 974, 987.

Mitchell Zimmerman, writing in *The Computer Lawyer*, argued that the goal of plaintiffs is not necessarily to protect consumers from source confusion, but rather to prevent newcomers to the market from getting a "free ride" on someone else's recognition by the consumer. That said, he argued that patent and copyright protection, not trade dress protection, are the appropriate legal guidelines.[98]

On the other hand, Lauren Fisher Kellner, writing in *The University of Chicago Law Review*, argued in favor of using trade dress law to protect user interfaces where copyright law fails. The key difference, Kellner noted, is that copyright law protects computer programs as works of authorship, whereas trade dress law could protect the combination of elements that add up to the "look and feel" of the user interface.[99]

To bolster this argument, Kellner cited a recent case in which the courts considered protection for computer software user interfaces under copyright law yet used language applicable to trade dress law.[100] Kellner argued that had the plaintiff sued under the Lanham Act as a trade dress infringement, it might have prevailed.[101]

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[97] Mitchell Zimmerman, *Trade Dress Protection for User Interfaces Revisited and Interred?* 13 THE COMPUTER LAWYER (1996), 4-9.

[98] *Id.* at 5, 6. "Although software users may often be able to recognize a product by its user interface or feature set, [software users] do not generally consider interfaces or feature sets to be indicia of source, and hence should not be considered to constitute trade dress at all."

[99] Kellner, *supra* note 23, at 1014. *See also* Richard Armstrong Beutel, *Trade Dress Protection for the "Look and Feel" of Software: The Lanham Act as an Emerging Source of Proprietary Rights Protection for Software Developers*, J. PAT. [& TRADEMARK] OFF. SOC'Y, (1989), 974-88.

[100] *See* Apple Computer, 799 F. Supp at 1006. Apple sought protection of the entire Macintosh audio-visual display as a whole. Instead, the court considered each element separately and would not protect them.

[101] Kellner, *supra* note 23, at 1016, 1017.

In two other cases where the same plaintiff did prevail on a claim of infringement of its spreadsheet program, the courts applied copyright law.[102] However, Kellner noted that opinion relied on trademark rationale and extended the scope of copyright to the "look and feel" of a computer software program. For this reason, Kellner argued that the door is open for computer software manufacturers to succeed in the future under the Lanham Act.[103]

Summary

Legal scholars have addressed in detail various aspects of trade dress law. Individually they have looked at cases involving product configuration, private-label manufacturers, protection of color alone, and computer software user interfaces. Often, cases in one category provide rationale for arguments in cases of another category.

These scholars have noted how the circuits are divided on appropriate tests to use in deciding trade dress cases. They have also vigorously debated the tension between trade dress, patent, and copyright law and what should be the reasonable limitations of each.

While a number of scholars have considered the importance of the 1988 Amendments to the Lanham Act and subsequent U.S. Supreme Court decisions in *Two Pesos* and *Qualitex*, they have tended to look at the impact of these developments on single cases or categories of cases. None to date have analyzed cases across all categories to determine what impact these developments have had and to identify trends or continued splits among the federal Courts of Appeals. This paper will make such an analysis.

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[102] *See* Lotus I, 740 F. Supp at 37; *See* Lotus II, 799 F. Supp at 203.

[103] Kellner, *supra* note 23, at 1017.

RESEARCH QUESTION & METHODOLOGY

This paper will address the following research question: How have the 1988 Amendments to the Lanham Act and the U.S. Supreme Court decisions in *Two Pesos* and *Qualitex* affected the federal courts' interpretation and application of the Lanham Act in trade dress infringement cases?

This paper will analyze the 38 federal Courts of Appeals cases alleging trade dress infringement that have been decided since the 1992 *Two Pesos* decision.

ANALYSIS OF CASES

This analysis will show that even though the U.S. Supreme Court has expanded the definition of trade dress through its decisions in *Two Pesos* and *Qualitex*, the courts are not yet willing to allow protection of product configurations as trade dress when this would conflict with patent or copyright law. Furthermore, though the U.S. Supreme Court now allows protection of color alone as a trademark, plaintiffs still find it difficult to meet the other burdens of proof to exercise that right. Finally, this analysis will reveal that splits endure between the federal circuits with regard to application of the Lanham Act, even though the U.S. Supreme Court intended to settle them with the *Two Pesos* decision.

Two Pesos, Inc. v. Taco Cabana, Inc. (1992)

To understand the impact *Two Pesos* has had on subsequent trade dress cases, it is useful to consider in more detail the facts of this case and how they allowed the U.S. Supreme Court to expand the definition of trade dress to include "the total image of the business."[104] In this particular case that meant "the shape and general appearance of the exterior of the restaurant, the identifying sign, the interior kitchen floor plan, the decor, the menu, the equipment used to serve food, the servers' uniforms and other features."[105]

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[104] *See* Two Pesos, 505 U.S. at 764.

Two Pesos and Taco Cabana operated competing chains of Mexican fast-food restaurants in Texas. Taco Cabana began operation in 1978 and by 1985 had six restaurants in San Antonio, each featuring "a festive eating atmosphere having interior dining and patio areas decorated with artifacts, bright colors, paintings and murals."[106]

Two Pesos entered the Houston, Texas, market in 1985 and began expanding throughout the state with a motif very similar to Taco Cabana's. In 1987, Taco Cabana expanded to the Houston market and filed suit for, among other issues, trade dress infringement of its motif. The jury in the U.S. District Court for the Southern District of Texas held: "Taco Cabana has a trade dress, it is non-functional, it is inherently distinctive, it has not acquired secondary meaning in the Texas market, and the alleged infringement creates a likelihood of confusion for ordinary customers as to the source or association of the restaurant's goods or services."[107] The jury found for Taco Cabana and awarded damages.

Two Pesos appealed, arguing that the judge had incorrectly instructed the jury. Two Pesos argued that if the jury did not find Taco Cabana's trade dress had developed secondary meaning in the marketplace, it should not have protected it.[108] The Fifth Circuit Court of Appeals upheld the lower court's ruling, following its own precedent *In re Chevron Chemical Co. v. Voluntary Purchasing Groups, Inc.*[109] The Fifth Circuit noted in its opinion that the precedent in *Chevron* conflicted with other Courts of Appeals, specifically the Second Circuit, which required proof that the trade dress was both inherently distinctive and has acquired secondary meaning.[110] As discussed earlier, the U.S. Supreme Court stated that it granted certiorari to resolve this conflict among the Courts of Appeals and ultimately affirmed the Fifth Circuit's decision.[111]

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[105] *Id.*
[106] *Id.* at 765.
[107] *Id.*
[108] *Id.* at 767.
[109] *See* Chevron, 659 F.2d at 695.

In addition to settling the requirement of secondary meaning, the Court also held that Lanham Act protection applies in the same manner to trade dress as it does to trademarks. Heretofore, the courts had not accorded trade dress the same level of protection as trademarks.[112] Because the Lanham Act seeks to prohibit unfair competition, the Court explained its reasoning in terms of effects on the competitive marketplace.[113]

Product Configuration Infringement Cases

In addition to the broader language in the 1998 Amendments to the Lanham Act, the expanded definition of trade dress in *Two Pesos* has opened a floodgate of new cases, especially in the category of product configuration. The majority (21 of 38) of the federal Courts of Appeals cases analyzed for this paper alleged trade dress infringement of product configurations. This is a highly contentious area of trade dress litigation because it brings into question the proper limits of patent, copyright, and trademark law.

In general, the courts are not willing to allow trade dress protection, which is renewable indefinitely, for product features that patent or copyright law will only protect for a limited period of time. The expansion of the definition of trade dress in *Two Pesos* has perhaps encouraged many plaintiffs to seek trade dress protection for product configurations. However, the courts are still very careful to not allow trade dress protection to become overbroad.

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[110] *See* Two Pesos, 505 U.S. at 767. *See also* Vibrant Sales, 652 F.2d at 299.
[111] *See* Two Pesos, 505 U.S. at 767.
[112] *Id.* at 774.
[113] *Id.* at 775.

> Denying protection for inherently distinctive nonfunctional trade dress until after secondary meaning has been established would allow a competitor, which has not adopted a distinctive trade dress of its own, to appropriate the originator's dress in other markets and to deter the originator from expanding into and competing in these areas.

A key decision cited by legal scholars and in the opinions of many subsequent cases was *In re Duraco Products, Inc. v. Joy Plastic Enterprises, Ltd.*[114] In this action, Duraco alleged that Joy Plastic had infringed its design of a Grecian-style plastic planter. The Third Circuit denied Duraco's claim, concluding that traditional trade dress law as it applies to product packaging "does not 'fit' a product configuration case."[115] The court reasoned that trade dress law applies to features which are "conceptually separate from the product," not the product itself.[116]

The Eighth Circuit takes the opposite view. *In re Stuart Hall Co., Inc. v. Ampad Corp.*[117] the Court of Appeals reversed and remanded the district court's denial of a preliminary injunction against Ampad, which Stuart Hall claimed had infringed upon the trade dress of its project planner and personal notebook. The Eighth Circuit held: "'Trade dress' is a single concept encompassing both product configuration and packaging, and either configuration or packaging can be inherently distinctive, requiring no showing of secondary meaning to merit Lanham Act protection."[118]

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[114] *See* Duraco, 40 F.3d at 1431.

[115] *Id.* at 1434.

[116] *Id.* at 1432.

> It is not proper to transplant categorical distinctiveness inquiry developed for trademarks to product configurations, where alleged trade dress lies in very product itself. In order to be inherently distinctive, product feature or combination or arrangement of features, i.e., a product configuration, for which Lanham Act trade dress protection is sought must be unusual and memorable; conceptually separate from the product; and likely to serve primarily as designator of origin of the product.

[117] Stuart Hall Co., Inc. v. Ampad Corp., 51 F.3d 780 (8th Cir. 1995).

[118] *Id.* at 782.

Many product configuration cases hinge on whether the courts determine the trade dress involved is functional. The federal Courts of Appeals do not agree about which party has the burden of proof in this matter (see Table 2 in the Appendix).[119]

In the *Vornado* decision mentioned earlier and cited in many subsequent opinions, the Tenth Circuit held that product features protected under a utility patent, which will eventually expire and enter the public domain, cannot be protected as trade dress.[120] Interestingly, the court pointed out in the *Vornado* opinion, which denied trade dress protection for a household fan grill: "Neither the latest version of the [Lanham] statute nor the wording prior to the 1988 revision makes any mention of product shapes or configurations."[121] Accordingly, the court held that the freedom of competitors to copy features of patented products after the patents expire supersede the desire by manufacturers to trademark such features.[122]

The Seventh Circuit, *In re Thomas & Betts Corp. v. Panduit Corp.*, also dealt with protection of product features, this time features disclosed in an expired patent.[123] The Court of Appeals reversed a district court ruling and denied protection for Thomas & Betts' cable ties (small nylon belts used to bundle wires) because it found the features in question were functional.[124]

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[119] *See supra* notes 43-50.

[120] *See* Vornado, 58 F.3d at 1498.

> Where disputed product configuration is part of claim in utility patent, and configuration is described, significant inventive aspect of the invention, so that without it the invention could not fairly be said to be the same invention, patent law prevents its protection as trade dress, even if configuration is nonfunctional.

[121] *Id.* at 1504.

[122] *Id.* at 1508. "We conclude that the inability freely to copy significant features of patented products after the patents expire impinges seriously upon the patent system's core goals, even when those features are not necessary to competition."

[123] Thomas & Betts Corp. v. Panduit Corp., 65 F.3d 654 (7th Cir. 1995).

[124] *Id.* at 654. "Even if product feature has acquired secondary meaning, doctrine of functionality bars its protection as trade dress if feature is one that is costly to design around or do without, rather than one that is costly to have."

In 1995 alone, the Second Circuit decided seven trade dress cases involving product configuration, several of which dealt with this issue of functionality. Most important of these was *Knitwaves, Inc. v. Lollytogs Ltd.*,[125] in which the Second Circuit abandoned its traditional test[126] for whether a trade dress is protectable and established a new one.[127] In deciding *Knitwaves* the court did not find the copyrighted sweater design at issue to be functional. However, the court said it should look at "whether it was likely to serve primarily as designator of origin of the product."[128] In doing so, the court found for Knitwaves in its copyright action, but denied it trade dress protection.

Interestingly, a few months prior to the *Knitwaves* decision, the Second Circuit also spoke to this issue of copyright, patent, and trademark law being in conflict with one another. In *In re Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, the court said it "should proceed with caution in assessing claims to unregistered trade dress protections as not to undermine objectives of those other laws."[129] The Second Circuit denied trade dress protection for greeting cards die-cut in the shapes of animals.[130]

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[125] *See* Knitwaves, 71 F.3d at 996.

[126] Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (2d Cir. 1976). "Arrayed in an ascending order roughly reflecting their eligibility to trademark status and the degree of protection accorded, the categories of terms are (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful, but the lines of demarcation are not always bright."

[127] *Id.* "In determining whether each of manufacturer's sweater designs could be protected as trademark, Court of Appeals could not ask whether design was generic, descriptive, suggestive or arbitrary or fanciful; rather, court would ask whether it was likely to serve primarily as designator of origin of product."

[128] *Id.* at 998.

[129] Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc., 58 F.3d 27, 28 (2d Cir. 1995).

> Although trade dress law may supplement copyright and patent law by protecting unpatentable product configurations and novel marketing techniques, overextension of trade dress protection can undermine restrictions in copyright and patent law that are designed to avoid monopolization of products and ideas; consequently, courts should proceed with caution in assessing claims to unregistered trade dress protections as not to undermine objectives of those other laws.

[130] *Id.*

Packaging Infringement Cases

Aside from product configuration, most other trade dress cases deal with some aspect of packaging. Thirteen of the cases included in this analysis fit into this category. A key issue for these cases is whether the trade dress is likely to cause confusion among ordinary customers as to the source of the competing products. The *Two Pesos* decision spoke directly to this issue and is cited in every opinion.[131] These cases are harder to summarize regarding their outcome because the facts are often so different and because the courts are split concerning which party has the burden of proof for each factor of the infringement test.

The types of infringement alleged in these cases also varies greatly – the "PM" of over-the-counter analgesic Excedrin PM[132] to packaging of L'eggs Sheer Energy pantyhose,[133] Merriam-Webster's dictionary,[134] Werther's Original butter candy[135] or the Greek liqueur ouzo,[136] among others. However, the one thing they have in common is that the courts go through similar steps in each to determine whether the trade dress has met the *Two Pesos* test.[137] Where these cases sometimes differ is in how their respective circuits arrive at their conclusions and which tests they apply for the individual findings of inherent distinctiveness, secondary meaning, likelihood of confusion, and non-functionality.

For example, the Second Circuit often applies a test for finding secondary meaning from *Centaur Communications, Ltd. v. A/S/M Communications, Inc.*[138] and a test for likelihood of confusion from *Polaroid Corp. v. Polarad Electronics Corp.*[139] The Eighth Circuit uses a test from *Co-Rect Prods. Inc. v. Marvy! Advertising Photography, Inc.*, to determine whether a likelihood of confusion exists.[140]

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[131] *See* Two Pesos, 505 U.S. at 763.
[132] *See* Bristol-Myers Squibb, 973 F.2d at 1033.
[133] Sara Lee v. Kayser-Roth, (4th Cir. April 17, 1996).
[134] Merriam-Webster v. Random House, 35 F.3d 65 (2d Cir. 1994).
[135] August Storck K.G. v. Nabisco, Inc., 59 F.3d 616 (7th Cir. 1995).
[136] Paddington Corp. v. Attiki Importers & Distributors, Inc., 996 F.2d 577 (2d Cir. 1993).
[137] *See* Two Pesos, 505 U.S. at 763.
[138] Centaur Communications, Ltd. v. A/S/M Communications, Inc., 830 F.2d 1217, 1222 (2d Cir. 1987). The elements are: (1) advertising expenditures, (2) consumer studies linking the mark to the source, (3) unsolicited media coverage of the product, (4) sales success, (5) attempts to plagiarize the mark, and (6)

These differences among the federal Courts of Appeals are significant, especially for nationally branded and distributed products. The nature of interstate commerce means that while products compete nationally, the interpretation of the federal Lanham Act varies regionally. This leads to inconsistencies in application of a federal statute designed to prevent unfair competition and has the potential to encourage forum shopping, in which plaintiffs seek the most sympathetic federal jurisdictions to sue for trade dress infringement.

There are obvious similarities between some tests, but the fact remains that each federal circuit usually bases decisions on its own precedents. Many times, the decision by the federal Courts of Appeals is to either deny or uphold a preliminary injunction imposed by the district court on the infringing party and then to remand the case for trial with specific instructions as to which test to apply.

In the Excedrin PM case the Second Circuit denied Bristol-Myers Squibb Co., maker of Excedrin PM, a preliminary injunction granted by the lower court against the maker of Tylenol

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length and exclusivity of the mark's use. No single factor is determinitive, and every element need not be proved.

[139] Polaroid Corp. v. Polarad Electronics Corp., 287 F.2d 492 (2d Cir.), *cert denied*, 368 U.S. 820 (1961). Where the products are different, the prior owner's chance of success is a function of many variables: the strength of his mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers.

[140] Co-Rect Prods, Inc. v. Marvy! Advertising Photography, Inc., 780 F.2d 1324, 1330 (8th Cir. 1985). The six factors are: (1) the strength of the owner's mark; (2) the similarity between the owner's mark and the alleged infringer's mark; (3) the degree to which the products compete with each other; (4) the alleged infringer's intent to "pass off" its goods as those of the owner; (5) incidents of actual confusion; and (6) the type of product, its costs, and conditions of purchase.

PM after holding that "PM" is descriptive and therefore not protectable.[141] In the L'eggs pantyhose case the Fourth Circuit applied its test[142] to determine likelihood of confusion. The Fourth Circuit then reversed and remanded the case with directions for the lower court to find for Sara Lee, maker of L'eggs, because it found that Kayser-Roth's No Nonsense pantyhose package had confusingly similar trade dress to the L'eggs Sheer Energy pantyhose package.[143]

In the Merriam-Webster case, the Second Circuit used its precedent in *Polaroid*[144] to determine whether Random House's trade dress for its dictionary was likely to cause confusion among customers with Merriam-Webster's dictionary.[145] The Second Circuit reversed the finding by the lower court against Random House, stating that Merriam-Webster's bull's-eye logo and the very name Merriam-Webster "are neither strong nor distinctive."[146]

In the Werther's Original candy decision, the Seventh Circuit reversed a preliminary injunction granted by the lower court against Nabisco for making comparative claims about Werther's on its Life Savers Delites candy package. Werther's sought the injunction to stop Nabisco before it went to market with this package, which is unusual. Most trade dress cases allege infringement that has already occurred and seek damages for injury. Werther's lost, in part, because the court held that comparative advertising was beneficial to consumers.[147]

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[141] *See* Bristol-Myers, 973 F.2d at 1033.

[142] Pizzerio Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir. 1984).

> To ascertain the likelihood of confusion between two trademarks, we consider a number of factors. These factors include: (1) the distinctiveness of the senior mark; (2) the similarity of the two marks; (3) the similarity of the goods or services that the marks identify; (4) the similarity of the facilities employed by the parties to transact their business; (5) the similarity of the advertising used by the parties; (6) the defendant's intent in adopting the same or similar mark; and (7) actual confusion. Certain factors may not be germane to every situation; moreover, though several factors are simultaneously present, some factors may, depending on the case, be more important than others.

[143] *See* Sara Lee, 4th Cir. April 17, 1996.

[144] *See* Polaroid, 287 F.2d 492

[145] *See* Merriam-Webster, 35 F.3d at 70.

[146] *Id.* at 71.

[147] *See* August Storck K.G., 59 F.3d at 616.

The Werther's case is somewhat reminiscent of the *Conopco* decision,[148] in which the Federal Circuit held that a private-label manufacturer had not infringed the trade dress of Conopco's Vaseline Intensive Care Lotion. In both cases, the Courts of Appeals have ruled that trade dress which incorporates another product's trademark for comparative purposes does not infringe. Rather, the courts have ruled that consumers' needs for comparative product information outweigh the brands' needs to protect their trade dress.[149]

Finally, the case involving the Greek liqueur ouzo perhaps best exemplifies the importance of *Two Pesos* to trade dress litigation. In *Paddington Corp. v. Attiki Importers & Distributors, Inc.*,[150] the district court decided – prior to *Two Pesos* – against Paddington regarding the packaging of ouzo it imported. The district court held that Paddington could not prove its trade dress had acquired secondary meaning *in addition to* proving it was inherently distinctive. By the time the case reached the Second Circuit Court of Appeals, the U.S. Supreme Court had eliminated the requirement of proving secondary meaning in its *Two Pesos* decision. Paddington won on appeal, illustrating how the courts immediately embraced the *Two Pesos* test.

Color Infringement Cases

The federal Courts of Appeals have only decided three cases regarding protection of color alone as trade dress since *Two Pesos*, one before and two after the landmark *Qualitex* decision.[151] None of the three indicate that plaintiffs are finding it easy to qualify for protection of color alone as trade dress.

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[148] *See* Conopco, 46 F.3d at 1556.
[149] *Id.*
[150] *See* Paddington, 996 F.2d at 577.
[151] *See* Qualitex, 115 S.Ct. at 1300.

Interestingly, *In re Brunswick Corp. v. British Seagull, Ltd.*,[152] which was decided prior to *Qualitex*, the Federal Circuit had much to say about the functionality of color and did not rely on the old "color depletion theory"[153] courts traditionally used to deny color protection before *Qualitex*.

In *Brunswick*, the Federal Circuit denied protection of the color black for outboard motors as "de jure functional." It held: "De facto functional means that the design of a product has a function, i.e., a bottle of any design holds fluid. De jure functionality, on the other hand, means that the product is in its particular shape because it works better in this shape."[154] The Federal Circuit affirmed the lower court finding that Brunswick's color black for its outboard motors was de jure functional, meaning it had a competitive advantage rather than was necessary to the design of the product, and therefore was not protectable as trade dress.[155]

However, as legal scholars have pointed out, the *Qualitex* decision has not made it particularly easy for plaintiffs to protect color alone as trade dress.[156] *In re Mana Products, Inc. v. Columbia Cosmetics Mfg., Inc.*, the Second Circuit did not allow protection of Mana's black makeup compact, holding that its trade dress was neither inherently distinctive nor had it acquired secondary meaning.[157] *In re Fabrication Enterprises, Inc. v. Hygenic Corp.*, the Second Circuit did reverse the decision by a lower court that Hygenic's color system for exercise bands was functional and remanded it for trial.[158] However, the Second Circuit also cited *Qualitex* and noted that a defendant can defeat a case of alleged infringement by proving that the trade dress in question is functional.[159]

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[152] Brunswick Corp. v. British Seagull, Ltd., 35 F.3d 1527 (Fed. Cir. 1994), *cert denied*, 115 S.Ct. 1426 (1995).

[153] *See* Qualitex, 115 S.Ct. at 1306. "To permit one, or a few, producers to use colors as trademarks will 'deplete' the supply of usable colors to the point where a competitor's inability to find a suitable color will put that competitor at a significant disadvantage."

[154] *See* Brunswick, 35 F.3d at 1531.

[155] *Id.*

[156] Morico, *supra* note 18.

[157] Mana Products, Inc. v. Columbia Cosmetics Mfg., Inc., 65 F.3d 1063 (2d Cir. 1995).

[158] Fabrication Enterprises, Inc. v. Hygenic Corp., 64 F.3d 53 (2d Cir. 1995).

Computer User Interface Infringement Cases

A single case in the Fifth Circuit is the only one during the time period of this analysis that deals with alleged trade dress infringement of computer user interfaces. *In re Engineering Dynamics, Inc. v. Structural Software, Inc.*, the Fifth Circuit upheld the finding by the lower court that there was "little likelihood of confusion among the relevant users of the computer programs at issue."[160] The case involved alleged infringement of a structural engineering software program. In determining whether there was a likelihood of confusion, the Court of Appeals considered testimony at the district court trial "that both products were targeted at a fairly limited and sophisticated market. . . Furthermore, these programs' trade dress is largely irrelevant when sophisticated users decide which program to purchase."[161]

CONCLUSIONS

Clearly the expansion of protection of trade dress in the 1988 Amendments to the Lanham Act and subsequent interpretation by the U.S. Supreme Court in *Two Pesos* and *Qualitex* has resulted in some unusual cases for trade dress infringement. No longer do plaintiffs restrict their allegations of infringement to traditional issues of packaging. They now seek protection for the configurations of their products. Of the 38 cases considered in this analysis, 21 alleged infringement of a product configuration, while only 13 alleged infringement of packaging. Three alleged infringement of color alone, and one case alleged infringement of a computer software user interface (See Table 1 in Appendix).

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[159] *Id.*

[160] Engineering Dynamics, Inc. v. Structural Software, Inc., 26 F.3d 1335 (5th Cir. 1994).

[161] *Id.* at 1350.

The courts must wrestle with the reasonable limits of trade dress protection, particularly in the area of product configuration. Often these cases simultaneously pursue protection under copyright and/or patent law as well as trademark law. In some cases, plaintiffs seek protection under trademark law when no remedy is available under copyright or patent law.

Upon early investigation of this topic, the expectation was to find that the courts have embraced the expanded definitions of trade dress and given it greater protection subsequent to the 1988 Lanham Act Amendments and U.S. Supreme Court decisions in *Two Pesos* and *Qualitex*. It was a surprise to learn that, at least in terms of product configuration cases, the federal Courts of Appeals are very careful to uphold the spirit and intent of the copyright and patent laws and their importance to free enterprise. In doing so, the courts are reluctant to allow trade dress protection as a remedy for plaintiffs' product designs or useful features that cannot otherwise qualify for patent or copyright protection or as a way to extend such protection beyond the finite terms of those statutes.

Furthermore, the *Qualitex* decision may have officially enabled plaintiffs to protect color alone as a trademark, but this analysis has supported the prediction by legal scholars that the burdens of proof required for protection remain prohibitively high for most plaintiffs. What will be interesting to see is how the courts apply the *Qualitex* decision in cases where plaintiffs seek protection of the colors of their computer monitors or software user interfaces.

Equally as interesting as the splits among federal Courts of Appeals regarding how to decide certain trade dress issues is the split between lower courts and their respective Courts of Appeals. In this analysis, many times the Courts of Appeals overturned decisions by the lower courts or remanded them for trial with specific instructions as to which test to apply. One message gleaned from this analysis is that the parties, particularly defendants, that lose at the district level often have good reason to consider appealing, as the Courts of Appeals may very will reverse the decision.

Finally, most disturbing about this analysis is the fact that while interstate commerce flourishes and the courts state their wishes to nurture a free and open marketplace, application of the federal statute designed to do so is still handled parochially. It appears inevitable that the U.S. Supreme Court will again be called to settle splits among the federal circuits and establish a more precise national standard regarding the protection of trade dress. For a summary of tests and standards enunciated in the cases in this analysis, see Table 2 in the Appendix.

APPENDIX

Table 1. Tally of trade dress cases analyzed.

Court of Appeals	Product Configuration	Packaging	Color	Computer Software Interface	Total
First	1	0	0	0	1
Second	7	4	2	0	13
Third	2	0	0	0	2
Fourth	0	2	0	0	2
Fifth	0	0	0	1	1
Sixth	0	1	0	0	1
Seventh	2	5	0	0	7
Eighth	2	1	0	0	3
Ninth	2	0	0	0	2
Tenth	1	0	0	0	1
Eleventh	0	0	0	0	0
Federal*	4	0	1	0	5
Total	**21**	**13**	**3**	**1**	**38**

*All Federal Circuit decisions apply the law in the circuit from which the case was appealed.

Table 2. Summary of tests and standards enunciated in this analysis.

Court of Appeals	Issue	Standard or Test Enunciated
Fed. Cir.	All Issues	*Atari, Inc*:[162] It applies laws of regional circuits from which cases arise.
2nd Circuit	Product Configuration	*Knitwaves:*[163] In determining whether each of manufacturer's sweater designs could be protected as trademark, Court of Appeals could not ask whether design was generic, descriptive, suggestive or arbitrary or fanciful; rather, court would ask whether it was likely to serve primarily as designator of origin of product.
	Secondary Meaning	*Centaur Communications:*[164] The elements are: (1) advertising expenditures, (2) consumer studies linking the mark to the source, (3) unsolicited media coverage of the product, (4) sales success, (5) attempts to plagiarize the mark, and (6) length and exclusivity of the mark's use. No single factor is determinative, and every element need not be proved.
	Likelihood of Confusion	*Polaroid:*[165] (1) the strength of his mark; (2) the degree of similarity between the two marks; (3) the proximity of the products; (4) the likelihood that the prior owner will bridge the gap; (5) actual confusion; (6) the reciprocal of defendant's good faith in adopting its own mark; (7) the quality of defendant's product; and (8) the sophistication of the buyers.
3rd Circuit	Inherent Distinctiveness	*Duraco*:[166] Product feature or combination or arrangement of features, i.e., a product configuration, for which Lanham Act protection is sought must be unusual and memorable; conceptually separate from the product; and likely to serve primarily as designator of origin of the product.
	Burden of Proof - Functionality	*Merchants & Evans:*[167] Plaintiff must prove trade dress is non-functional.
4th Circuit	Secondary Meaning	*Pizzeria Uno:*[168] (1) long use; (2) advertising; (3) sales volume; and (4) identity of service or origin in the minds of the purchasing public.
7th Circuit	Functionality; Product Configurations	*Thomas & Betts:*[169] Even if product feature has acquired secondary meaning, doctrine of functionality bars its protection as trade dress if feature is one that is costly to design around or do without, rather than one that is costly to have. Trade dress protection only extends to role of product features as signific of source.
	Burden of Proof - Functionality	*Computer Care:*[170] Defendant must prove trade dress is functional.
8th Circuit	Likelihood of Confusion	*Co-Rect:*[171] (1) the strength of the owner's mark; (2) the similarity between the owner's mark and the alleged infringer's mark; (3) the degree to which the products compete with each other; (4) the alleged infringer's intent to "pass off" its goods as those of the owner; (5) incidents of actual confusion; and (6) the type of product, its costs, and conditions of purchase.
	Burden of Proof - Functionality	*Woodsmith Publishing.:*[172] Plaintiff must prove trade dress is non-functional.
9th Circuit	Likelihood of Confusion	*E. & J. Gallo Winery:*[173] (1) strength of the allegedly infringed mark; (2) proximity of relatedness of the goods; (3) similarity of the sight, sound, and meaning of the marks; (4) evidence of actual confusion; (5) degree to which the marketing channels converge; (6) type of goods and degree of care consumers are likely to exercise in purchasing them; (7) intent of the defendant in selecting the allegedly infringing mark; and likelihood that the parties will expand their product lines.
	Burden of Proof - Functionality	*Rachel:*[174] Plaintiff must prove trade dress in non-functional.
11th Circuit	Burden of Proof - Functionality	*Elmer:*[175] Plaintiff must prove trade dress is non-functional.

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[162] Atari, Inc. v. JS&A Group, Inc., 747 F.2d 1422 (Fed. Cir. 1984).
[163] *See* Knitwaves, 71 F.3d at 996.
[164] *See* Centaur Communications, 830 F.2d at 577.
[165] *See* Polaroid, 287 F.2d at 492.
[166] *See* Duraco, 40 F.3d at 1431.
[167] *See* Merchants & Evans, 963 F.2d at 628..
[168] *See* Pizzerio Uno, 74 F.2d at 1527.
[169] *See* Thomas & Betts, 65 F.3d at 654.
[170] *See* Computer Care, 982 F.2d at 1063.
[171] *See* Co-Rect, 780 F.2d at 1330.
[172] Woodsmith Publishing Co. v. Meredith Corp., 904 F.2d 1244, 1247 (8th Cir. 1990).
[173] E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1290 (9th Cir. 1992).
[174] Rachel v. Banana Republic, 831 F.2d 1503 (9th Cir. 1987).
[175] Elmer v. ICC Fabricating, Inc., 67 F.3d 1571 (Fed. Cir. 1995).

Obstacles to Defamation Recovery in Cyberspace User Forums

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ABSTRACT

The ancient tort of defamation may not survive in interactive cyberspace user forums for the very reasons that those forums appeal to many--they are easily accessible, anonymous, international, high-volume, rapid-transmission, chaotic forums. Existing statutory and case law favors system operators, a likely target of suits. Courts are reluctant to leave the defamed without remedy, but fortunately, an alternative remedy that maximizes freedom of expression, the opportunity for reply, is inherent in the medium.

Like Halloween revelers who do, masked, what they would not do unmasked, users insulated from face-to-face confrontation attack one another with abandon in cyberspace. "Flaming"--slang for assailing another with vituperative comments--is epidemic in cyberspace user forums like bulletin boards, newsgroups, and lists. Statements that might earn defamation recovery if published outside of cyberspace are everywhere in these forums. Traditional definitions of defamation seem to characterize well many of these messages: "A defamatory communication usually has been defined as one which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided."[1] Defamation is "that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, good-will or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."[2] The ease with one can retaliate against those with whom one disagrees doubtless may allow many to post in haste what they would not post after further reflection. Scores may read one's scathing comments. Comments delivered in a moment of rage are not simply spoken and forgotten, but may be preserved for enormous audiences.[3]

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[1] Prosser and Keeton on Torts 773 (5th ed. 1984).

[2] *Id.* (footnotes omitted).

[3] Compare the following:

> The promise of the virtual neighborhood has proved far-fetched at best. How could it be otherwise when the communicants are faceless and voiceless, many writing

Cyberspace is not always a mannerly place, but the harm of defamation is more serious than bad manners. The potential for rumors, accurate or not, to spread quickly and result in reprisals against their subject is enormous. An eighteen-year old University of Maryland student posted a message to at least eleven Internet newsgroups accusing a woman of mistreating her teenage daughter.[4] The student had never met the girl and was merely repeating rumors.[5] The message provoked outraged calls to the family and a police investigation of whether the girl was mistreated.[6] The potential for lost income resulting from the online circulation of defamatory messages is staggering. One can easily envision false rumors, circulated in cyberspace, causing stock prices to plummet before the rumors can be denied.

Courts have been forced to balance First Amendment interests in free flow of information with their solicitude toward allowing

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> under assumed names? Facelessness brings out the beast in people. As exhibit A, consider that the first verb cyberspace contributed to the language was "to flame," meaning to singe someone's eyebrows with an obscene or derogatory message. Flaming has become the on-line sport of choice; whole sectors of the Internet are given over to the most putrid insults. A curse muttered on the street disappears into the air. A flame echoes on, to be read by millions. The information superhighway may yet rise to its lofty promise. But as of now, its most pronounced accomplishment has been to chisel into stone trash what would better have been left to disappear.

Brent Staples, *Beastly Manners in Cyberspace*, New York Times, Oct. 13, 1994, at A:26.

[4] Scott Bowles & Todd Shields, *Internet Message Prompts Call for a Student Code*, Wash. Post, Feb. 15, 1996, at B1.

[5] *Id.*

[6] *Id.*

recovery for damage to reputation. The medium in which the alleged defamation circulates may appear to have little bearing on whether recovery should be permitted, but cyberspace presents new high obstacles to defamation recovery. In Part I, I consider potential obstacles to defamation liability that hold regardless of whether the defendant is a system operator or the person posting. In Part II, I turn to obstacles to recovery against system operators particularly, the most likely targets of suits. In Part III, I conclude by arguing that a "self-help" remedy--the opportunity for reply--a remedy "inherent" in cyberspace user forums--may be the only remedy available to the defamed in cyberspace. Note, crucially, that my arguments here mainly concern defamatory material in the interactive user forums of cyberspace--not in cyberspace "genres" that are not interactive, such as web sites, or in materials that are "published," in static form, online. Traditional defamation law is arguably more applicable in non-interactive genres, though some obstacles to recovery, discussed in Part I(C), arise there as well.

I. OBSTACLES TO RECOVERY THAT APPLY TO SYSTEM OPERATORS AND OTHER ONLINE DEFENDANTS

Several features that may make public forums in cyberspace appealing may also make defamation recovery less likely. Among these are wide access, within the United States and internationally; colorful postings of opinion; and anonymity.

A. Wide Access to Cyberspace May Undermine Credibility

If anyone with Internet access may post to a huge audience, then perhaps few posts will be taken seriously. Perhaps few posts will even be read in some high-volume forums, like lists. Users may choose to turn to other sources of entertainment and information, rather than reading countless postings of dubious veracity. If user forums continue to be places where users may post freely--and as stories of users duped by baseless postings proliferate--the Internet's reputation for veracity may be annihilated. In a medium where users take what they read with a grain of salt, plaintiffs will be unable to prove harm--a requirement for defamation recovery. Today, with cyberspace still novel to many, some may be confused about the veracity of messages. Brock Meeks, editor of WIRED Magazine, said of the Internet:

> [I]t's kind of like the fax machine was in its early days, when everybody would race to the fax machine when something came in because it had a sense of urgency. Of course, now we just let our faxes pile up and usually end up trashing them, but for some reason, electronic mail or something that you receive via the Internet has this air of urgency and authenticity that's still not understood.[7]

It may not be long before the Internet is as passé as the fax machine. If a stranger on the street were telling passers-by rumors, probably few would believe or act upon those statements without verifying them. The analogy may be appropriate for cyberspace. In widely accessible environments, users may develop appropriate skepticism.

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[7] Interview with Brock Meeks, ALL THINGS CONSIDERED, National Public Radio, Transcript # 2124-6, Feb. 15, 1996.

Moreover, expectations for veracity in cyberspace may be low because we want them low. Low expectations of credibility may be a price worth paying for the freedom to say whatever we want. And being whoever we want, for whomever will listen, has value, even if one's fantasy is limited to cyberspace.

B. Hyperbole and Opinion May Not be Actionable

Because of First Amendment concerns, the Supreme Court has barred defamation recovery when no reasonable person would believe alleged defamatory remarks because they are hyperbolic. When the tenor of a flame war or negative posting is hyperbolic, and it usually is, defamation recovery may be unlikely, for the Court is solicitous of protecting colorful expression. In Greenbelt Cooperative Publishing Assn., Inc. v. Bresler,[8] a real estate developer had negotiated with the city council for a zoning variance on his land, while simultaneously negotiating to sell other land the city. A newspaper published articles stating that some people had characterized the developer's negotiating position as "blackmail."[9] The Court found that no reasonable reader could find that the word "blackmail" implied that the developer had committed the actual crime of blackmail, so liability could not be premised on a false allegation of the crime of blackmail.[10] The Court in *Bresler* analogized to cases in which it held that the First Amendment precluded recovery for emotional distress when an ad parody "could not reasonably have been interpreted as stating actual facts about the public figure involved,"[11] and to a case in which it held that the use of the word "traitor" in a literary definition of a union "scab" was not basis for a defamation action under federal labor law, because the word was used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members."[12] The Court emphasized, however, that the published reports of what some referred to as "blackmail" were "accurate and full"--so much so that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable."[13] Potential defamation defendants in cyberspace may not always be as careful to accompany their colorful expressions with full accounts of the behavior they criticize--accounts so full that they leave no doubt as to the hyperbolic nature of the language used. Nonetheless, in many cases, *Bresler* may be a bar to defamation recovery for postings rich in "lusty and imaginative" expressions.

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[8] 398 U.S. 6 (1970).

[9] *Id.* at 13.

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[10] *Id.*

[11] *Id.* (*citing* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)).

[12] *Id.* (*citing* Letter Carriers v. Austin, 418 U.S. 264, 284-286 (1974)).

[13] *Id.* at 13-14.

Another related obstacle to defamation recovery arises because many statements that users post in cyberspace are opinions. In Milkovich v. Lorain Journal,[14] the Court ruled that expressions of opinion with no probably false factual connotation are not defamation. The Court cautioned that there is no "wholesale defamation exemption for anything that might be labeled 'opinion,'" and that the words "I think" offered no talismanic protection from liability.[15] The Court said that there is no real difference between the statements "In my opinion John Jones is a liar" and "Jones is a liar."[16] Both statements are actionable, because they can be proved false if the speaker did not really think that Jones lied, but published the statements anyway.[17] However, the statement "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin" is *not* actionable because "it is a statement of opinion relating to matters of public concern which does not contain a provable false factual connotation . . . ."[18] Many flame wars could be defended by analogy to this example; one regularly sees users accusing one another of abysmal ignorance for their ideas. The Court protects such statements in the interest of "assuring that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of this Nation."[19] The Court added that it will consider the tone of the language, and it said that "loose, figurative, or hyperbolic language" and "the general tenor of the article" could negate the impression that the author was seriously maintaining facts at issue.[20] Such considerations militate against finding defamation liability for hyperbolic online exchanges.

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[14] 497 U.S. 1 (1990).

[15] *Id.* at 19.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 20.

C. Anonymity, Protean Identity, and a Global Network

Even if posted messages are read, and one suffers reputational loss, cyberspace presents another obstacle to recovery--an obstacle that arises whether material is posted in an interactive forum or elsewhere in cyberspace. Today, anyone can be whoever she wants. Now on America Online, the most popular system operator, creating a new identity is as easy as creating a username. At least once, however, America Online has given law enforcement officials access to some mailboxes.[21] Whether United States courts will again authorize the penetration of anonymity for any purpose, including defamation cases, remains to be seen. Anonymous remailers provide further, higher obstacles to American authorities.[22] Sending key-encrypted messages through chains of anonymous remailers may make penetrating anonymity impossible.

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[19] *Id.* (*citing* Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6).

[20] *Id.* at 21.

[21] Peter H. Lewis, *Company Says Electronic Mail Was Opened to Find Pornography*, at A:16.

What appears to be one person online may actually represent many RL ("real-life") persons, and, on the contrary, several online personas may originate from one RL person. The possibility of protean, multiple identities in cyberspace presents mind-boggling legal challenges. Imagine, for instance, that "NetGuy" provides pornographic material online for pay. NetGuy is in RL a collective of ten women and men, whose membership has changed over the last five years. Online, NetGuy is represented by a photograph of one young man, and "he" interacts with customers. Imagine that a user circulates rumors that NetGuy is a child molester in RL. NetGuy's business begins to fail. NetGuy sues for defamation. A former member of the collective was once convicted of a sex crime against a minor. NetGuy's accuser claims a truth defense. What outcome? Problems of group libel are complicated when they arise offline. Possibilities for even greater complexity abound online, where identity and truth may be more complicated and rapidly shifting than existing law can accommodate.[23]

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[22] When Finnish authorities were investigating allegations that a user posted materials taken from a Church of Scientology computer, they sought to seize the computer that is the most-used anonymous remailer, anon.penet.fi in Finland. Johan Helsingus, the man who supports anon.penet.fi, gave the name of the user they sought. Daniel Akst, *Postcards From Cyberspace: The Helsinki Incident and the Right to Anonymity*, LOS ANGELES TIMES, Feb. 22, 1995.

Another obstacle to defamation recovery that arises whenever legal issues in cyberspace are considered is the limited role of United States law in a global network. The limited success of nations and international lawmaking bodies in resolving life-and-death issues warrants skepticism that they will make international agreements regarding jurisdiction for civil suits in cyberspace. Even when U.S. courts could subject foreign defendants to their jurisdiction, would plaintiffs be willing to raise such potentially expensive and risky suits? The lowest common denominator among nations' defamation laws may have the greatest chance of enforcement. That certainly is not the United States' complicated blend of common and constitutional law. Some American lawyers' belief that enforcing U.S. defamation law is even a possibility in cyberspace may reveal their hubris and provincialism.

II. OBSTACLES TO RECOVERY AGAINST SYSTEM OPERATORS PARTICULARLY

Because plaintiffs may be unable to identify and gain jurisdiction over individuals who defame them, and because many defendants would be unable to pay large damages, logical targets for defamation suits are system operators, many of which have "deep pockets." To date, the issue in two major cyberspace defamation cases has been whether a system operator is liable for defamatory statements that were uploaded or posted by others. The underlying issue in both cases was whether to classify a system operator as a publisher or distributor, a distinction that derives from defamation cases with bookstores as defendants. In a little-known provision of the Communications Decency Act of 1996, titled, "Protection for 'good samaritan' blocking and screening of offensive material," Congress said, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[24] This provision is not among those provisions of the act whose constitutionality has, at this writing, been challenged.[25] Any defamation plaintiff may challenge the provision's constitutionality in federal court. A final ruling on the standard to be imposed on system operators may be distant. I now turn to the two major cases which motivated the congressional determination and the arguments that may help us predict a Supreme Court ruling on the issue.

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[23] For discussion of postmodern identity online, see Sherry Turkle, LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET (New York: Simon and Schuster, 1995).

A. *Cubby* and PRODIGY

In Cubby, Inc. v. CompuServe, Inc.,[26] the system operator, CompuServe, was not held liable for defamatory statements in a daily newsletter that it uploaded. Though the forum was not one of the user-dominated forums that are our focus here, the case addresses the issue of classifying system operators. The court cited New York common law for the finding that CompuServe was a distributor rather than a publisher: "With respect to entities such as news vendors, book stores, and libraries, . . . New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation."[27] The court then turned to First Amendment law, and found that requiring that a distributor have knowledge of the contents of a publication before imposing liability is "deeply rooted in the First Amendment," which prevents courts from imposing strict liability on distributors.[28] The Court had reasoned in Smith v. California that

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[24] 47 U.S.C. º 230(c)(1) (1996).

[25] Only the provisions of the Act relating to obscenity and child pornography, Sections 223(a)(1)(B), 223(a)(2), 223(d)(1), and 223(d)(2), have thus far been challenged, and ruled unconstitutional, in American Civil Liberties Union v. Reno, 929 F.Supp. 824, 883 (E.D. Pa., 1996) (appeal pending).

[26] 776 F.Supp. 135 (S.D.N.Y. 1991).

> 'Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience.' And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.[29]

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[27] *Id.* at 139 (*citing* Lerman v. Chuckleberry Publishing, Inc., 521 F.Supp. 228, 235 (1981).

[28] 776 F.Supp. at 139.

[29] *Id.* at 139-40 (*citing* Smith v. California, 361 U.S. 147, 152-53).

The analogy of the system operator to a bookstore seems appropriate, but too weak. The practical constraints of screening material posted online seem even more daunting than the practical constraints of screening books in a bookstore, because of the pacing and volume of information flow in cyberspace.

The *Cubby* court did not address the applicability of its decision to system operators fulfilling other roles, such as gateway, content provider, database, or bulletin board. Thus the *Cubby* court did not rule that all system operators would be considered distributors, rather than publishers, of information on bulletin boards and other forums where users post. Regarding bulletin boards, a publisher standard of liability would seem to exact impossible requirements of system operators. Among the main advantages of electronic bulletin boards is that they provide the ability to communicate instantaneously with a large number of other users. The advantages of such forums--volume and speed--are the practical burdens that make screening for defamation so daunting. Screening for defamation involves determining which statements may harm reputation, determining which of those are false, and then screening out the false statements. Though electronic screening for certain words is possible, screening for defamation presents unpleasant choices. Screening out all messages that, at first reading, might possibly harm reputation would leave little for users to discuss. Such screening might strangle the medium. The alternative, screening out false statements, seems almost impossible if bulletin boards are to resemble their current form. Screening out false statements would require no less than fact-checking departments like those operating at major magazines. The cost could be staggering. The NEW YORKER's legendary fact-checking department employed sixteen checkers in 1994.[30] Fact checking is a time-consuming process. Fact checking takes people, exercising judgment, looking up facts and making telephone calls. It is difficult to imagine how the process could be accelerated to enable the rapid exchanges possible in cyberspace today. If screening were attempted, potentially defamatory statements whose truth a bulletin board's employees could not immediately verify would have to be suppressed, delayed, or posted at the risk of incurring liability.

Despite the difficulties of screening for defamation, the court in the unreported decision in Stratton Oakmont, Inc. v. PRODIGY Services Company[31] found that system operators shall not always be considered distributors, even of bulletin boards. Crucial to the court's finding that PRODIGY was a publisher were findings that PRODIGY held itself out as a family-oriented computer network with content guidelines, and that it exercised editorial control over the content of its bulletin boards through electronic software screening programs and board leaders who could delete material.[32] Because of the editorial control that PRODIGY attempted to exercise, the court found that PRODIGY could not be held to be a mere distributor, defined as a "passive conduit" of material that could not be found liable in the absence of fault.[33] Instead, the court found that PRODIGY exercised sufficient editorial control over its bulletin boards to render it a publisher with the same responsibilities as a newspaper. The court took pains to note that it did not differ with the court in *Cubby* in finding that bulletin boards should generally be regarded as analogous to bookstores and libraries, but noted that PRODIGY's "policies, technology and staffing decisions"[34] mandated the finding that it was a publisher.

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[30] Antony Shugaar, Truth or Consequences, COLUMBIA JOURNALISM REV., May/June 1994, at 14. Back in 1981, PEOPLE MAGAZINE spent $800,000 a year on its fact-checking department, which employed eighteen people plus free-lancers. Does *Saul Bellow Stand on His Head? Ask a Fact Checker*, WALL ST. J., Dec. 15, 1981, at 1.

[31] 1995 WL 323710 (N.Y. Supp.).

The defendant Interactive Services Association (ISA), in its amicus brief advocating rehearing of the case, argued that much precedent weighs against the PRODIGY decision. The ISA emphasized that publishers select material for publication with "specific and actual knowledge of its contents," and have the practical opportunity to "examine the material, evaluate the reputation and reliability of the author, and conduct appropriate fact and source investigation prior to publication."[35] Citing the sheer volume and rapid pace of message exchange on bulletin boards, the ISA argued that a system operator could perform none of these functions on electronic bulletin board messages that third parties post.[36] The ISA noted that several courts have not required distributors to check the truthfulness of messages circulated using several technologies, including print and telegraph.[37] Nor did a court find that a network television affiliate broadcasting a network program had to check truthfulness of the broadcast.[38] Moreover, the ISA pointed out that a medium's guidelines for limiting the transmission of obscenity have never been used to justify imposing upon it a publisher standard of liability. For instance, even though a printer eliminated what it deemed "nudity, profanity, and vulgarity" from printed material, a federal court ruled that it did not have the additional responsibility of testing the truth of statements submitted by independent authors.[39]

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[32] *Id.* at *2-*3.
[33] *Id.* at *3.
[34] *Id.* at *5.
[35] Memorandum of Law of Interactive Services Association in Support of Motion for Leave to File Submission as Amicus Curiae

B. Market Forces Are Unpredictable

One may wonder if the court in PRODIGY, in an attempt to maintain cyberspace's current freedoms, imposed publisher liability to

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and Motion for Renewal and Reargument of Defendant Prodigy Services Company (Aug. 29, 1995) (hereinafter ISA Memo).

[36] *Id.*

[37] Misut v. Mooney, 124 Misc. 2d 95, 99, 475 N.Y.S.2d 233, 235-36 (Sup. Ct. Suffolk Co. 1984) (printer); O'Brien v. Western Union Telegraph Co., 113 F.2d 539, 542 (1st Cir. 1940) (telegraph company).

[38] Auvil v. CBS 60 Minutes, 800 F. Supp. 928, 931-32 (E.D. Wash. 1992).

[39] Misut v. Mooney, 475 N.Y.S.2d at 235-36.

make unbearable the costs of erecting controls like PRODIGY's. The court disavowed this rationale when it said that those who fear that the decision "will compel all computer networks to abdicate control of their bulletin boards[] incorrectly presume[] that the market will refuse to compensate a network for its increased control and the resulting increased exposure [to liability]."[49] Apparently, the court envisioned an island within cyberspace that was different from the largely uncontrolled atmosphere that prevails today. There, users weary of encountering false information could find bulletin boards with editorial control similar to a newspaper's. To answer the question of whether there is a market for bulletin boards that act as publishers, other questions must be answered first. How much money are users willing to pay to use a fact-checked bulletin board? How much accuracy are users willing to exchange for the freedom of instantaneous high-volume traffic in ideas? Users may have to pay considerably higher fees for a bulletin board to employ staff to screen for possibly defamatory content, and (presuming the law allows defamation recovery in user forums) to absorb the cost of litigation and damages in the occasional defamation suit, or to absorb the cost of liability insurance. Users might also face substantial delays in receiving or posting messages that must be fact-checked. How much money users will pay, and how much delay they will tolerate, are empirical questions about which I can only speculate here. The markets involved are so new that predictions seem risky, but current trends are discouraging. Many are predicting that current market pressures will force monthly access fees down.[41] But market forces may change. Users fooled by false statements in cyberspace today may be willing to pay more--in fees, and in speed of communication--to avoid being fooled again. And advertising on system operators' pages may help offset the cost of liability insurance.

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[49] ISA Memo at *3.

If courts follow the congressional ruling that system operators not be considered publishers, and disregard PRODIGY, bulletin boards may continue to be the free forums they are today. Even if courts follow PRODIGY, the technological and cost constraints that publisher liability would impose on a rapid-paced, high-volume forum may force computer networks to abdicate control of bulletin boards; fact-checked bulletin boards may be an illusory alternative. Defamation plaintiffs may have no recourse but self-help, a remedy to which we return.

C. The First Amendment Defamation Cases May Limit Liability of System Operators

If courts rule that system operators are publishers, at least in some contexts, or if courts analogize system operators to publishers, those courts must apply a complicated line of First Amendment media cases that began with *New York Times v. Sullivan.*[42] Strong arguments against imposing defamation liability on system operators can be drawn from those cases. The Supreme Court has in those cases curtailed defamation liability without fault in the interest of protecting the dissemination of ideas.

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[41] Interview with Ken Auletta, Bob Huber, and Peter Lucky, All Things Considered, National Public Radio, Feb. 2, 1996; Peter H. Lewis, *A Boom for On-Line Services*, NEW YORK TIMES, July 12, 1994, at D:1 (predicting limited growth for the next several years unless monthly fees for online services drop below $10).

A principal distinction that courts applying the First Amendment defamation cases must draw is whether the plaintiff is a public official, public figure, or private figure. This distinction can be enormously complicated. At a general level, a public official applies "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for the control over the conduct of government affairs."[43] A public official holds a government position of such "apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it."[44] The Court ruled in *New York Times* that a public official could only recover damages for defamatory falsehood relating to official conduct when she proves that the statement was made with "actual malice."[45] Actual malice is knowledge that the defamation was false or was published with reckless disregard of whether it was false or not.[46] The plaintiff bears the burden of proving actual malice with "convincing clarity."[47] The Court subsequently extended the *New York Times* "actual malice" standard to public figures, defined as those who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[48] In Gertz v. Robert Welch, Inc., the Court ruled that private citizen who are not public officials, and are not public figures for all purposes, may be public figures with respect to a particular controversy.[49] Some plaintiffs are neither public figures generally nor with regard to a particular controversy. For such private figures, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[50] To collect punitive damages, however, a private individual must show actual malice.[51] Finally, a plurality of the Court found in Dun & Bradstreet v. Greenmoss Builders, Inc., that in all the previous cases, the speech involved expression "on a matter of public concern,"[52] but that because speech on matters of "purely private" concern is of less First Amendment concern, "the state's interest [in reputation] adequately supports awards of presumed and punitive damages--even absent a showing of 'actual malice.'"[53]

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[42] 376 U.S. 254 (1964).

[43] Rosenblatt v. Baer, 383 U.S. at 85, 86.

[44] *Id.*

[45] 376 U.S. at 279-80.

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[46] *Id.* at 280.
[47] *Id.* at 285-86.
[48] Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967).
[49] 418 U.S. 323, 352 (1974).
[50] *Id.* at 347.
[51] *Id.* at 349.
[52] 472 U.S. 749, at 757 (1985).

If the First Amendment cases tell us nothing else, they allow two predictions. First, the Court seems likely to follow its precedents and require plaintiffs to prove system operators' fault before imposing defamation liability--perhaps higher levels of fault for cases involving public figures and speech of public concern. A finding of fault is a very high barrier to recovery, given the technological constraints of fact checking. Second, given the Court's long history of balancing interests in the dissemination of ideas against interests in protecting reputation, it seems likely that the Court will be loathe to see defamed plaintiffs go entirely without remedy. The Court has made it clear that it is solicitous of protecting reputation. It said in *Gertz* that "First Amendment protections shall not leave no remedy to the defamed."[54] It said in *Hepps* that

> the danger of self-censorship was a valid, but not the exclusive, concern in suits for defamation: The need to avoid self-censorship by the news media is . . ., not the only societal value at issue . . . [or] this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation.[55]

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[53] *Id.* at 761.

[54] 418 U.S. 344.

[55] 475 U.S. 767, 773 (*citing* Gertz, 418 U.S. at 341). *See also* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

The Court added that, "Any analysis must also take into account the 'legitimate state interest underlying the law of libel [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood.'"[56] The Court even said in Time, Inc. v. Firestone, that it sought the "appropriate accommodation between the public's interest in an uninhibited press and its *equally compelling* need for judicial redress of libelous utterances."[57]

III. Reply, The Inherent Self-Help Remedy

Given the defamation rulings, courts seem stuck. Imposing the publisher standard of liability would impose seemingly impossible fact-checking demands on a system operator. But the Supreme Court has indicated its reluctance to leave injured parties without any possible remedy. Fortunately, there is a remedy that is perhaps more readily available in cyberspace user forums than in any existing medium: access for a reply. If one is defamed on a newsgroup or on a list, one can post a reply. One can defend oneself real-time on a bulletin board. The reply may reach much of the audience who saw the alleged defamation, especially if the forum has many regular users, or the reply is posted quickly. One may post a reply on the Internet as soon as one becomes aware of another's false posting. The reply may be as prominently posted as the alleged defamation, unlike corrections in newspapers, which are often less prominently displayed. Indeed, there is no page one in many user forums, but only an ongoing dialogue. The reply is in the words of the aggrieved party, and she can introduce new material, so that rather than merely correcting false information, she can further debate.[58] When a plaintiff who is a public official or public figure takes on a media defendant, the Court requires that plaintiff to show a higher degree of fault than a private plaintiff in part because public officials and figures have media access in which to reply. In cyberspace, everyone with Internet access may have such access. In user forums, access is, in the words of one commentator, "inherent in the medium."[59] So is the opportunity for reply. Thus, cases involving alleged defamatory material may be resolved out of court. The advantages of resolving disputes involving false statements outside of the legal system are clear. Such disputes may be resolved quickly, perhaps so quickly that damage to reputation is avoided altogether. The right of reply is available to plaintiffs who would be unable to afford attorneys' fees for a defamation suit. The right of reply eliminates the threat that huge damage awards against Internet defendants may bankrupt them, or encourage them to regulate expression--and encouraging free expression is the guiding principle of First Amendment law.

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[56] *Id.* (*citing* Gertz, supra, 418 U.S., at 341, 94 S.Ct., at 3008.)
[57] 424 U.S. 448, 456 (1976) (emphasis added).

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[58] *Compare* Jerome A. Barron, *The Right of Reply to the Media in the United States--Resistance and Resurgence,* 15 **Hastings Comm/Ent L.J.** 1, 1 (1992) (discussing how the right of reply in traditional media offers these advantages over the right of retraction).

[59] Edward A. Cavazos, *Computer Bulletin Board Systems and the Right of Reply: Redefining Defamation Liability for a New Technology,* 12 **Rev. Litig.** 231, 247 (1992).

In Miami Herald Publishing Company v. Tornillo,[60] the Court invalidated a 1913 Florida statute that allowed a right of reply to political candidates who were attacked in the press. However, that ruling does not necessarily apply to the right of reply in defamation cases. Jerome Barron, attorney for the plaintiff and crusader for media access, notes that "In *Tornillo*, the right of reply statute under consideration did not require that a reply be afforded only if defamation were proven. Certainly the statute could have been given that gloss. But we neither asked for that interpretation, nor did the Florida courts provide it."[61] Therefore, contrary to some misreadings of the case, "*Tornillo* did not deal with the validity under the First Amendment of a right of reply statute directed at providing a remedy for defamatory attack."[62] More importantly, the Court's rationale for ruling against a right of reply in print media is of dubious applicability to cyberspace user forums, where the opportunity for reply is inherent. The Court said, "Compelling editors or publishers to publish that which 'reason tells them should not be published' is what is at issue,"[63] and ruled that a right of access would be an "intrusion into the function of editors."[64]

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[60] 418 U.S. 241, 1 Med. L. Rptr. 1898 (1974).

[61] Barron, *supra,* at 5.

[62] *Id.*

[63] 1 Med. L. Rptr. 1904.

[64] *Id.*

The Court also said that "it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a state commands the readers should have available."[65] In Internet user forums, few operators have sought to exercise tight editorial control, and I have argued that they cannot. And Internet user forums do not face the practical and economic limits on space that newspapers do. The dialogue in lists, newsgroups, and bulletin boards expands infinitely. The only costs are to those users who are paying for service providers for online time, and those users are free to log off after reading however much or little they wish. Thus the Court's ruling against the right of reply in *Tornillo* has little bearing to defamation in cyberspace user forums.[66]

The remedy of media access is not a perfect remedy. Even in user forums, where timely reply is possible, there remains the possibility that the reply will not "catch up with" the rumors. Indeed, the Court does not treat media access as a perfect remedy in *New York Times* and its progeny; despite their access to media, public figures can still be defamed through actual malice of media defendants. But because locating and gaining jurisdiction over defamation defendants may be difficult or impossible when anonymity and international access are common, and because screening for defamation may be an impossible burden on system operators, self-help--the opportunity for reply--may be the only practical remedy in cyberspace. If courts deem self-help a sufficient remedy in some cyberspace forums, they will have largely abandoned the tort of defamation there. Abandonment of defamation in cyberspace would surely please tort reformers who have proposed alternative remedies, rather than damages, in traditional media.[67]

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[65] *Id.*

[66] Though it is encouraging that the Court upheld the constitutionality of a right of reply under the Federal Communication Commission's personal attack and political editorial rules in Red Lion Broadcasting Company v. Federal Communication Commission, 395 U.S. 367 (1969), that ruling too bears only indirectly on online defamation, because the Court based its ruling on the scarcity of broadcast frequencies. "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." *Id.* at 388.

If courts refuse enforcement of defamation law in cyberspace interactive forums, vigorous debate, and flame wars, will continue. Users may or may not pay attention. At least sometimes, false rumors will circulate. The aggrieved will have access to reply to those rumors. A slight risk of uncompensated harm will be the price of that freedom. Perhaps courts will require system operators to post notices that users are assuming that risk. The risk may be acceptable, for the stakes are so high. Media ownership is increasingly concentrated in an ever-smaller number of corporations' hands. Most people have no easy media access. Cyberspace is a comparatively free forum--in Ralph Nader's words, "the lowest-entry-barrier mass-communications system in history."[68] A forum where people who are not public figures or members of the press can express their views freely seems more and more vital. The Court in *New York Times* raised this issue in another context, when it decided not to discourage editorial advertising because it did not wish to "shut off an important outlet for the promulgation of information and ideas by person who do not themselves have access to publishing facilities--who wish to exercise their freedom of speech even though they are not members of the press."[69] Cyberspace user forums may be such outlets, and the access inherent in them may eliminate the need for imposing defamation law there. The result may be chaotic. But as a court said in holding some provisions of the Communications Decency Act of 1996 unconstitutional, "Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects."[70]

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[67] *See, e.g.*, the proposed Uniform Correction or Clarification of Defamation Act (1993) (proposing remedy of correction); Annenberg Washington Program, Proposal for the Reform of Libel Law (1988) (proposing remedies of retraction and reply); Marc Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 **U.S.F. L. R.** 1 (1983) (proposing retraction or "restoration" or reputation remedies); James H. Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 **Am. U. L. R.** 375 (1981) (proposing a declaratory hearing on falsity of statements and a declaratory judgment).

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[68] T. R. Reid and Brit Hume, *Bulletin Boards Make for Cut-rate Media Moguls*, **Chi. Trib.**, Dec. 8, 1991, at C8.
[69] 376 U.S. at 266.

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[70] American Civil Liberties Union v. Reno, 929 F.Supp. 824, 883 (E.D. Pa., 1996) (appeal pending).